Office-Supreme Court, U.S.
FILED
MAR 18 1981
ALEXANDER L. STEVAS,
CLERK

80-1589

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1980

BROWN BOVERI ELECTRIC, INC.
Switchgear Systems Division
(formerly Gould, Inc., Switchgear Division)
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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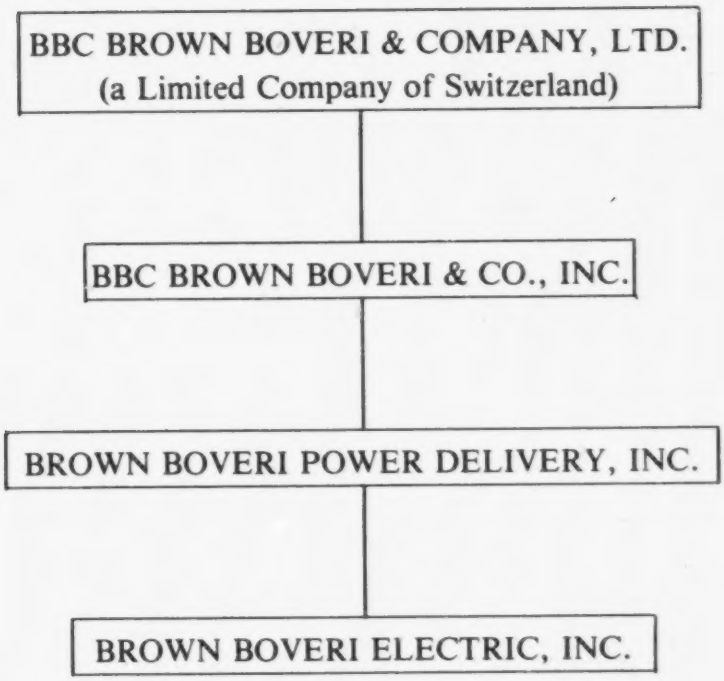
BBC BROWN BOVERI & COMPANY, LTD.
(a Limited Company of Switzerland)
BBC BROWN BOVERI & CO., INC.
BROWN BOVERI POWER DELIVERY, INC.
BROWN BOVERI ELECTRIC, INC.

QUESTIONS PRESENTED

1. In the absence of any dispute between Petitioner and any of its employees, (1) is the "mutual aid or protection" clause of §7 of the Labor Management Relations Act, 29 U.S.C., §157, broad enough to include collective action by Petitioner's employees in sympathy with informational or recognitional picketing directed at an unrelated third party employer with whom Petitioner was doing business, and (2) is such collective action permissible activity protected by §8(a)(1) of the Labor Management Relations Act, 29 U.S.C. §158(a)(1) when it takes the form of a strike?

2. Is the National Labor Relations Board, as a matter of national labor policy, deprived of the jurisdiction in an unfair labor practice proceeding to interpret the obligations of employees under a no-strike clause in a collective bargaining agreement when the interpretation of said clause has been previously litigated and concluded by a final and binding arbitration award issued pursuant to the mandatory dispute settlement procedures of the collective bargaining agreement?

3. Is an employee who seeks redress of an alleged unfair labor practice under the Labor Management Relations Act, 29 U.S.C. §151 *et seq.*, foreclosed as a matter of national labor policy from relitigating before the National Labor Relations Board the interpretation of the obligations of such employee under a no-strike clause in a collective bargaining agreement when the interpretation of said clause has already been litigated and concluded by a final and binding arbitration award issued pursuant to the mandatory dispute settlement procedures of the collective bargaining agreement?

4. Does a work stoppage by production and mainentance employees of the neutral employer at the neutral employer's

work place in response to an informational picket directed at a non-union electrical contractor performing remodeling work in the administrative offices at the neutral employer's plant (1) affect the quantum of proof required to establish a prima facie case that the objective of the picketing was illegal secondary activity prohibited by 8(b)(4) of the Labor Management Relations Act, 29 U.S.C. §158(b)(4), or (2) does the secondary effect of the picketing affect the evidentiary risk of nonpersuasion or the burden of going forward with the evidence?

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B. By affirming the refusal of the National Labor Relations Board to adopt the interpretation of the collective bargaining agreement as embodied in a final and binding arbitration award, the decision of the Court of Appeals is in direct conflict with decisions of this Court holding that the Board has no such preemptive jurisdiction, and with this Court's decisions in *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 96 S. Ct. 3141 (1976). 10

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v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Brown Boveri Electric, Inc., Switchgear Systems Division, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at ____ F.2d ___ (1980) (App. A, p. A-1).

The order denying Petitioner's motion for Rehearing and Suggestion for Rehearing En Banc is reported at ____ F.2d ____ (1980) (App. B, p. B-1). The decision of the National Labor

Relations Board adopting in large part the findings and conclusions of an Administrative Law Judge is reported at 238 NLRB No. 88 (1978) (respectively Apps. C and D, pp. C-1 and D-1).

JURISDICTION

The judgment of the Court of Appeals was entered November 7, 1980 (App. A, p. A-16). Petitioner's timely Petition for Rehearing was denied December 18, 1980 (App. B, p. B-1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant portions of the Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.*) are set forth below:

Section 8(a)

It shall be an unfair labor practice for an employer–

(1)

to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

Section 8(b)

It shall be an unfair labor practice for a labor organization or its agents–

(4)

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an ob-

ject thereof is:

* * *

(B) forcing to requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(7)

to picket or cause to be picketed or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees;

* * *

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in

such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

STATEMENT OF THE CASE

A. The Facts

The production and maintenance employees of Petitioner at its Tulsa, Oklahoma, plant have been represented by IBEW Local Union No. 584 for many years. The Tulsa plant manufactures electrical switchgear and related components.

The collective bargaining agreement covering Petitioner's Tulsa plant employees during 1977 provided:

> ARTICLE XXII—STRIKES AND LOCKOUTS
>
> In view of the procedure for the orderly settlement of grievances provided under the terms of this Agreement, the Union agrees that there will be no strike, work interference, or other stoppage or slowdown of work, total or partial, during the term of this Agreement.
>
> An employee or employees who participate in any such action in violation of this Agreement may be disciplined or discharged from the Company's service, subject to the employee's right to submit a grievance alleging improper discharge in accordance with the provisions of Article XX, Section 3, paragraph (c) of this Agreement.
>
> The Union agrees that it will take immediate, positive action to forestall or suppress any action on the part of

employees in violation of this Agreement.

The Company will not lock out any employee or employees while this Agreement is in force.

Sometime early in 1977, the Union and the employees of Petitioner learned that Petitioner would probably contract with a non-union electrical contractor to do some remodeling work in the administrative offices at the plant. The matter was even discussed at a regular union membership meeting and the Union's Business Agent warned Petitioner there would be a "problem" if a non-union electrical contractor performed work in Petitioner's facility.

On March 1, 1977, the non-union electrical contractor, Houchin Electric Company, commenced working on the remodeling job at Petitioner's Tulsa plant. A separate gate was established for Houchin's use. About nine o'clock that morning, Local Union No. 584 placed a picket outside the plant carrying a placard with the legend:

Informational
Houchin Electric
Does Not Have
Agreement With
Electrical Workers
L. U. 584

Shortly after the picketing commenced, Local Union No. 584 officials in the plant, Virginia Beekman, Chief Shop Steward, and Clifford Edgar, Unit President, became aware that the picketing was taking place.

Upon learning of the picketing, Chief Steward Beekman called the Union to discuss the matter with Local Union No. 584 Business Agent, Clinton Sroufe. Sroufe told her that the picket was aimed at Houchin Electric Company and that the Union had no grievance with Petitioner but each employee was free to

choose what to do in response to the Union's picket. Word spread throughout the plant that the employees should gather in the employee lunchroom for their midmorning break at ten o'clock a.m.

Unit President Clifford Edgar called the meeting to order in the lunchroom. Chief Steward Beekman fielded the questions from the assembled employees. Two votes were taken in the lunchroom concerning the employees' response to the picket, and Mr. Edgar admitted openly voting in favor of striking. The result of the votes in each case was that the employees would strike immediately.

The meeting did not end when the warning buzzer signaled the end of the break. Rather, the employees gathered again outside the lunchroom area and conducted a third vote under the leadership of Unit President Edgar. During this voting process, Chief Steward Beekman again called the Union Business Agent Sroufe to report to him the results of the meeting. Again, Sroufe instructed that each employee could act as he chose. Just as this vote was being concluded, Foreman Whitten approached the assembled group and instructed those who had already clocked out to leave the premises and for those who had not clocked out to return immediately to their work stations.

Despite this instruction from Supervisor Whitten, the employees began clocking out and leaving the plant. Chief Steward Beekman and Unit President Edgar joined in the mass exodus.

The strike lasted only one day, but the picketing continued for several weeks.

For participating in the strike in violation of the no-strike provisions of Article XXII of the collective bargaining agreement and for their failure as union officials to carry out their

duty under the contract to forestall or suppress the wildcat strike, Petitioner discharged Beekman and Edgar.

In addition to filing the NLRB charge, the Union proceeded to arbitration under the contract to test the validity of the discharges. The Arbitrator found that the two union representatives, Beekman and Edgar, had violated the collective bargaining agreement, but reduced the penalty to a sixty (60) day suspension (App. D, p. D-21).

B. The NLRB Decision

The Administrative Law Judge concluded that the strike was protected concerted activity and that the discharge of Beekman and Edgar was a violation of §8(a)(1) of the Act, 29 U.S.C. §158(a)(1).

The Administrative Law Judge further concluded that Petitioner had condoned the strike when it reinstated without any discipline all of the strikers other than Beekman and Edgar, rendered the discharges also violative of §8(a)(3) of the Act, 29 U.S.C. §158(a)(3).

In so doing, the Administrative Law Judge rejected Petitioner's contention that the strike was unprotected, but gave no factual basis for concluding the strike was protected (App. C, p. C-19-22, 26.) The Judge also rejected Petitioner's contentions that the picketing was illegal, and that the arbitration award that the strike was in violation of the collective bargaining agreement was binding upon the parties and the Board.

Petitioner filed timely Exceptions to the foregoing, but the National Labor Relations Board adopted the Administrative Law Judge's findings and conclusion, except that the Board declined to review the violation of §8(a)(3) as it would not affect the remedy ordered (App. C, p. C-2).

C. The Circuit Court Opinion

The Court of Appeals granted enforcement *in toto* of Respondent's application for enforcement of its Order (App. A, p. A-1).

REASONS FOR GRANTING THE WRIT

A. The decision of the Court of Appeals is in conflict with the principles for delineating the scope of the "mutual aid or protection" clause of §7 of the Labor Management Relations Act, and the concept of "protected" activity, as expressed by the Court most recently in *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 98 S. Ct. 2505 (1978).

The strike here presents the facts for explication of the Court's baseline stated in *Eastex, infra,* below which concerted activity by employees can no longer be deemed to be for their "mutual aid or protection."

> It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause. 437 U.S. at 567-568, 98 S. Ct. at 2513.

The striking employees sought nothing for themselves or for any other employees of any employer. They simply responded to a union information placard. To consider such action to be for mutual aid or protection is to carry the concept of mutual aid or protection well beyond reality. *Reed v. N.L.R.B.*, 430 F.2d 331 (10th Cir. 1970).

The decision of the Court in *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 98 S. Ct. 2505 (1978), expressed a three step test for

determining the protected status of employees' concerted activity directed at their employers, by which test it must be determined:

(1) That there is a sufficient relationship between the employees' concerted activity and the employees' interests as employees to bring the activity within the scope of the "mutual aid or protection" clause,[1] *and*

(2) That upon balancing the rights of all parties involved, the location in which the activity takes place is proper,[1] *and*

(3) That the form of the activity is appropriate to the object of the activity.[2]

Neither the Board nor the Court of Appeals attempted to reconcile with the *Eastex* test their conclusions that the strike was protected concerted activity.

The cases relied upon by the National Labor Relations

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[1] The first is whether, apart from the location of the activity, distribution of the newsletter is the kind of concerted activity that is protected from employer interference by §§7 and 8(a)(1) of the National Labor Relations Act. If it is, then the second question is whether the fact that the activity takes place on petitioner's property gives rise to a countervailing interest that outweighs the exercise of §7 rights in that location. See *Hudgens v. NLRB,* 424 U.S. 507, 521-523, 96 S. Ct. 1029, 1037-1038, 47 L.Ed.2d 196 (1976); *Central Hardware Co. v. NLRB,* 407 U.S. 539, 542-545, 92 S. Ct. 2238, 2240-2242, 33 L.Ed.2d 122 (1972); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 112, 76 S. Ct. 679, 684, 100 L.Ed. 975 (1956); *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 797-798, 65 S. Ct. 982, 985, 89 L.Ed. 1372 (1945). We address these questions in turn. 437 U.S. at 563, 98 S. Ct. at 2511.

[2] In addition, even when concerted activity comes within the scope of the "mutual aid or protection" clause, the forms such activity permissibly may take may well depend on the object of the activity. "The argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within 'mutual aid or protection' is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing." Getman, The Protection of Economic Pressure by Section 7 of the National Labor Relations Act, 115 U. Pa. L.R. 1195 (1967). 437 U.S. at 568, fn. 18, 98 S. Ct. at 2513-2514, fn. 18.

Board (App. C, p. C-2), the Administrative Law Judge (App. C, p. C-19-23) and by the Court of Appeals (App. A, p. A-6-8) in support of their respective conclusions that the strike by Petitioner's employees was a protected activity are all factually inapposite to this case. Some of those cases involved a refusal to cross a lawful picket line at another employer's place of business, which Congress expressly protected with the first proviso in 29 U.S.C. §158 (b)(4). The remainder involve refusals by employees to cross picket lines directed at their own employer, and thereby strike, in support of fellow employees who have a labor dispute with their common employer.

It appears the Court of Appeals conceived, but did not clearly state, that freedom to picket or strike is sacrosanct. Here the information picketing is directed at a stranger employer and there is no labor dispute with either employer involved. To hold a strike protected in these circumstances is insupportable.

In *Eastex, supra,* the Court relied in part on the statutory definition of "employee" in §2(3) of the Labor Management Relations Act, 29 U.S.C. §152(3), as an expression of Congressional intent as to the breadth of the "mutual aid or and protection" clause. 437 U.S. at 564, 98 S. Ct. at 2511-2512.

Section 2(3) also extends employee status to strikers by including "any individual whose work has ceased as a consequence of, or in connection with, any current *labor dispute* or because of any unfair labor practice . . . ." This indicates a Congressional intent to control the use of economic pressure by protecting it only under limited circumstances.

B. By affirming the refusal of the National Labor Relations Board to adopt the interpretation of the collective bargaining agreement as embodied in a final and binding arbitration award, the decision of the Court of

Appeals is in direct conflict with decisions of this Court holding that the Board has no such preemptive jurisdiction, and with this Court's decisions in *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 96 S. Ct. 3141 (1976).

It appears that this case presents to the Court for the first time a concise factual basis for decision on the fundamental issue of the premier forum for the interpretation of collective bargaining agreements. The whole concept industrial arbitration is in serious jeopardy of being neutered if the Court of Appeals opinion is not reversed.

Despite the numerous decisions of the Court supporting the private dispute-settlement process, both the Board and the Court of Appeals ignored them.

The Court of Appeals (App. A, p. A-10) and the Administrative Law Judge (App. C, p. C-20) relied upon this Court's decision in *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 407-408, 96 S. Ct. 3141, 3147-3148 (1976) to support the proposition that the Arbitrator could not imply that the no-strike clause prohibited sympathy strikes. The Court did not so hold, but rather stated the District Court could not make such implication to support issuance of a *Boy's Market* injunction. 428 U.S. at 407-409, 96 S. Ct. at 3147-3148.

The Court's opinion in *Buffalo Forge* is in direct contradiction of the Court of Appeals rationale herein. 428 U.S. at 405-406, 96 S. Ct. at 3146-3147:

> The parties involved here are bound by collective-bargaining contracts each containing a no-strike clause which the Union claims does not forbid sympathy strikes. The employer has the other view, its complaint in the District Court, asserting that the work stoppage violated the no-strike clause. Each of the contracts be-

> tween the parties also has an arbitration clause broad enough to reach not only disputes between the Union and the employer about other provisions in the contracts but also as to the meaning and application of the no-strike clause itself. *Whether the sympathy strike the Union called violated the no-strike clause, and the appropriate remedies, are subject to the agreed-upon dispute-settlement procedures of the contracts and are ultimately issues for the arbitrator. Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L.Ed.2d 1403 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960). The employer thus was entitled to invoke the arbitral process to determine the legality of the sympathy strike and to obtain a court order requiring the Union to arbitrate if the Union refused to do so. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 94 S. Ct. 629, 38 L.Ed.2d 583 (1974). *Furthermore, were the issue arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision. Steelworkers v. Enterprise Corp.*, supra. (Emphasis supplied).

The decision of the Court in *Buffalo Forge, supra,* did not alter the industrial common law relative to no-strike obligations, and arbitrators have continued to hold that sympathy strikes are forbidden by broad no-strike clauses identical to the one in Respondent's collective bargaining agreement. *Sterling Regal, Inc.*, 69 Labor Arb. 513, 535 (Kaplan, 1977); *Westinghouse Transport Leasing Corp.*, 69 Labor Arb. 1210, 1213 (Sergent, 1977); *American Totalisator Co., Inc.*, 74 Labor Arb. 377 (Gentile 1980). See also *National Homes Mfg. Co.*, 72 Labor Arb. 1127 (Goodstein 1979).

The Court has also ruled that the Board does not have preemptive jurisdiction to interpret collective bargaining agreements *N.L.R.B. v. Strong,* 393 U.S. 356, 360-361, 89 S. Ct. 541, 554-545 (1969).

Only where the contract contains no arbitration procedure, or where the procedure has not been utilized, has the Board been permitted to interpret the contract. *N.L.R.B. v. Strong, supra; N.L.R.B. v. C & C Plywood Corp.,* 385 U.S. 421, 427-428, 87 S. Ct. 559, 563 (1967); *Chas. Dowd Box Co. v. Courtney,* 368 U.S. 502, 510-511, 82 S. Ct. 519, 524 (1962). See also *N.Y. Dis. Council No. 9 v. N.L.R.B.,* 453 F.2d 17 at 23-24, fn. 17 (2nd Cir. 1972); *N.L.R.B. v. Universal Services, Inc. & Assoc.,* 467 F.2d 579 at 584, fn. 5 (9th Cir. 1972); *Square D Co. v. N.L.R.B.,* 332 F.2d 360 (9th Cir. 1966).

A breach of contract strike is illegal, unprotected activity. *N.L.R.B. v. Sands Mfg. Co.,* 306 U.S. 332, 59 S. Ct. 508 (1939); *N.I R.B. v. Rockaway News Supply Co.,* 345 U.S. 71, 73 S. Ct. 519 (1953).

The Administrative Law Judge justified his refusal to abide by the prior Arbitration Award (App. D, p. D-1) on an arbitrary conclusion that the arbitrator did not interpret the scope of the no-strike clause but merely "assumed that the two discharged employees had breached the collective bargaining agreement" (App. C, p. C-6).

The Arbitrator set forth in his Award a complete statement of the evidence submitted to him, and made specific findings (App. D, p. D-21-22):

AWARD

The arbitrator makes the following award in connection with the parties of this case.

1. He finds that both Virginia Beekman and Clif-

ford Edgar were in fact guilty of insubordination on March 1, 1977 in walking out of the plant as they did and under the circumstances involving an illegal walkout.

2. This arbitrator finds that the actions of walking out on March 1 at the plant of the company was an illegal act and it is to be regretted that only two people must pay the penalty for their combined efforts.

3. This arbitrator feels that there should have been some action on the part of labor and/or management to have had a joint meeting and not let this matter get out of hand as it did. Both must accept some blame for the final results. *It could have been avoided.*

4. While the employees Virginia Beekman and Clifford Edgar did violate the agreement and the posted rules 7 and 8 of the company yet a discharge of the 2 parties was *too severe.* It is thereby ordered that Virginia Beekman and Clifford Edgar be and they are suspended for a period of 60 days from March 1 to May 1, 1977 and without pay. Pay for both shall begin on May 1, 1977 when they shall be considered to have returned to their positions at the same rate of pay when action was taken against them. Each Grievant reinstated shall have full rights of seniority and fringe benefits unaffected by the discharge but consistent with other provisions of the Agreement respecting period of disciplinary suspensions.

The Board's refusal to abide by the contractual interpretation embodied in this Award is highly destructive of the whole process of industrial arbitration. It is all the more destructive because the Board's Decision exceeds the scope of judicial review available to the parties to the arbitration. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S. Ct. 1358, 1362 (1960).

Tangential to the lack of Board jurisdiction is the proposition that the discharged employees should not be permitted to relitigate the arbitrator's interpretation of the no-strike clause, whether by res judicata, collateral estoppel or election of remedies.

In *Barrentine v. Arkansas-Best Freight System, Inc.*, 615 F.2d 1194 (8th Cir. 1980), the Court of Appeals affirmed dismissal of a suit grounded upon both the Fair Labor Standards Act and the Labor Management Relations Act because the plaintiffs had already had the dispute with their employer resolved in final and binding arbitration. The District Court also applied the effects of the arbitral contract interpretation to the other drivers on the basis of §203(d) of the Labor Management Relations Act, 29 U.S.C. §173(d) that dispute settlement "by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes." Petition for Certiorari was granted on this aspect of the case October 6, 1980, Docket No. 79-2006, 101 S. Ct. 70.

The Court of Appeals decision is herein arguably in conflict with decisions by the Third and Ninth Circuit Courts of Appeals.

In *N.L.R.B. v. Pincus Brothers, Inc. – Maxwell*, 620 F.2d 367 (3rd Cir. 1980), the Court of Appeals held that it was an abuse of discretion for the National Labor Relations Board to refuse to defer to a prior arbitration award finding that the discharged employee had been terminated for cause. There was no need for any contract interpretation in reaching an award in the arbitration.

Douglas Aircraft Co. v. N.L.R.B., 609 F.2d 352 (9th Cir. 1980) reaches the same result on similar facts as present in *Pincus Brothers, supra.* This case does differ in that there were two

reasons or "causes" found by the arbitrator as justification for the discharge that was clearly unprotected activity.

The arbitral award herein likewise has several causes supporting the disciplinary action (App. D. p. D-21–D-22). In addition to their participation in the strike, the arbitrator found the grievants had also violated plant rules 7 and 8 (App. D, p. D-7) involving insubordination and absence from duty without permission.

C. The conflict among several Circuit Courts of Appeal and the inconsistency of the National Labor Relations Board concerning the evidentiary standards in determining the object of picketing which has a secondary impact on neutral employers necessitates the establishment of uniform standards by the Court.

As a result of erratic and inconsistent applications of evidentiary standards in determining employer motivation in employment decisions, the Court established such standards, beginning in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), and recently reiterated in part in *Texas Department of Community Affairs v. Burdine*, Docket No. 79-1764, 49 USLW 4214.

In establishing a violation of the secondary boycott prohibitions of §8(b)(4) of the Labor Management Relations Act, 29 U.S.C. §158(b)(4), it is necessary to show that the object of the secondary activity was one specified in §8(b)(4).

Rarely do we have an admission by a union agent that the object of the secondary activity is one of the forbidden objects. *I.B.E.W. Local 480 v. N.L.R.B.*, 413 F.2d 1085 (D.C. Cir. 1969).

When secondary activity results in a work stoppage by

neutral employees, Petitioner submits that fact should lighten the evidentiary burden of persuading the trier of fact that an objective of the secondary activity was an unlawful one.

In this present case, there was evidence of a number of factors relied upon by the Board in prior cases and by various Courts of Appeals as sufficient to establish a *prima facie* case that the object of the secondary activity was unlawful:

(1) Several months before the picketing, Union Business Agent Sroufe warned Petitioner of a problem if a non-union electrical contractor performed work in Petitioner's plant.

(2) Several weeks before the picketing, Union Business Agent Sroufe told Petitioner's employees that there might be a picket at Petitioner's plant if a non-union electrical contractor went to work there.

(3) The picket sign did not indicate in any manner that no work stoppage was intended by the picketing. *National Maritime Union v. N.L.R.B.*, 342 F.2d 538 (2nd Cir. 1965).

(4) The Union had never attempted to unionize the employees of the primary employer Houchin Electric Company, and had picketed Houchin in only one site in three years – Petitioner's plant – the one site where the picketing would have the greatest impact because Petitioner's employees, as members of the picketing union, would naturally respond by striking. *N.L.R.B. v. Electrical Workers Local 3 (Wickham Constr. Co.)*, 542 F.2d 860 (2nd Cir. 1976); *enforcing* 220 NLRB Nos. 57 and 117; *Bexar Plumbing Co. v. N.L.R.B.*, 536 F.2d 634 (5th Cir. 1976);

(5) Although notified in advance that a work stoppage was about to occur among the neutral employees, Union Business Agent Sroufe not only did nothing to stop it, but in fact left the clear impression that the work stop-

page was proper. *N.L.R.B. v. Electrical Workers Local 3*, 477 F.2d 260 (2nd Cir. 1973); *Los Angeles Building & Trade Council (Sierra South Div., Inc.)*, 215 NLRB no. 59.

In *Local 761, I.U.E. v. N.L.R.B. (General Electric)*, 366 U.S. 667, 673-674, 81 S. Ct. 1285, 1289-1290 (1961) the Court states:

> "Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success." Local 294, supra, 284 F.2d at page 890. But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer. National Labor Relations Board v. International Rice Milling Co., supra.
>
> However difficult the drawing of lines more nice than obvious, the statute compels the task. Accordingly, the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts to promoting its cause. Although "[n]o rigid rule which would make * * (a) few factors conclusive is contained in or deducible from the statute," Sales Drivers, etc. v. National Labor Relations Board, 97 U.S. App. C.D. 173, 229 F.2d 514, 517, "[I]n the absence of admissions by the union of an illegal intent, the nature of act performed shows the intent." Seafarers International Union, etc., supra, 265 F.2d at page 591.

In *Local 761, supra* and in the later *United Steelworkers of America v. N.L.R.B. (Carrier)*, 376 U.S. 492, 84 S. Ct. 899 (1964), the picketing took place at the primary employer's place of business and employees of neutral employers refused to cross

the picket lines.

In both cases, the Court held the picketing to be lawful primary picketing in large part because the employees of the neutral employers were performing tasks in aid of day to day operations of the struck employer.

The refusal of a neutral employer's employee to cross a picket line at another employer's place of business is not a strike against the neutral employer. The employee is available to work for the neutral employer at other work sites.

Our case here presents a very different situation from that at the General Electric and Carrier plants. The picketing is at the neutral employer's plant, the neutral employees withhold all services, and the tasks of the neutral employer's employees and the primary employer's employees at the plant are completely unrelated.

With all these factors present here, the Administrative Law Judge gave only a cursory explanation for rejecting Petitioner's defense that the strike was illegal unprotected activity because the picketing was illegal secondary activity (App. C, C-19), and the Court of Appeals referred to it only by footnote (App. A, p. A-7, fn. 2).

The defense that the picketing was illegal was critical to Petitioner's defense, because a strike is illegal when undertaken in support of illegal picketing, *American Tel. & Tel. Co.*, 231 NLRB No. 11; *Cinch Mfg. Corp.*, 91 NLRB 371; *N.L.R.B. v. Southern Greyhound Lines,* 426 F.2d 1299 (5th Cir. 1970).

Picketing is always a signal to action. *Dallas General Drivers (Associated Wholesale Grocery),* 118 NLRB 1251; *Laundry Workers Local 298 (Southern Service Co.),* 215 NLRB No. 59

The signal is obviously strongest to the members of the

picketing union, which cannot be permitted to get away with a secondary boycott strike it knew would occur. *Electrical Workers Local 11 (L. G. Electric Contractors, Inc.),* 154 NLRB 766 and cases cited therein.

CONCLUSION

For the foregoing reasons, the Petitioner should be granted.

Respectfully submitted,

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APPENDIX A

PUBLISH

No. 79-1025

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
OCT 07, 1980
HOWARD K. PHILLIPS
Clerk

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

GOULD, INC., SWITCHGEAR DIVISION
Respondent

On Application for Enforcement of an Order of
the National Labor Relations Board
(No. 16-CA-7061)

Paul J. Spielberg, Attorney (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Sandra Shands Elligers, Attorney, with him on the brief), National Labor Relations Board, Washington, D.C., for Petitioner.

Richard L. Barnes of Kothe, Nichols and Wolfe, Inc., Tulsa, Oklahoma, for Respondent.

Before BARRETT, PECK* and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

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*Of the United States Court of Appeals, Sixth Circuit, sitting by designation.

This case is before the court on the petition of the National Labor Relations Board for enforcement of its order against Gould, Inc. The Board found that Gould violated section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. §158(a)(1), by discharging two Union officials, Virginia Beekman and Clifford Edgar, for participating in a sympathy walkout. The walkout was prompted by the Gould employees' refusal to cross an informational picket line directed against Houchin Electric, a nonunion contractor performing remodeling work on Gould's premises. The Board found that the picketing was lawful primary activity and that the Gould employees' sympathy walkout in support of the picket line was concerted activity protected by sections 7 and 8(a)(1) of the Act. 29 U.S.C. §§157, 158(a)(1). We agree.

Gould's manufacturing employees are represented at its Tulsa, Oklahoma plant by the manufacturing division of the International Brotherhood of Electrical Workers Local Union 584 (the Union). At the time of the walkout, the Company and the Union were bound by a collective bargaining contract which in-

cluded a grievance procedure leading to arbitration. In addition, the contract contained the following general no-strike clause (Article XXII), which is linked to the grievance-arbitration machinery:

> *"In view of the procedure for the orderly settlement of grievances* provided under the terms of this Agreement, *the Union agrees that there will be no strike,* work interference, or other work stoppage or slowdown of work, total or partial, during the term of this Agreement.
>
> *"An employee or employees who participate in any such action in violation of this Agreement may be disciplined or discharged* from the Company's service, subject to the employee's right to submit a grievance alleging improper discharge in accordance with the provisions of Article XX, Section 3, paragraph (c) of this Agreement."

Rec., vol. II, at 237 (emphasis added).

In addition to the manufacturing division, the Union has two other autonomous divisions, construction and maintenance. The informational picket which triggered the walkout was set up by the Union on behalf of its construction division as part of its two-year campaign to organize the employees of electrical construction contractors. The picket sign contained the word "Information," and warned readers that Houchin Electric Company did not have an agreement with Local 584.

When Beekman, the Shop Steward for Gould's manufacturing employees, became aware of the picketing at around 9:30 a.m. on March 1, 1977, she telephoned Union Business Manager Stroufe to inquire about it. Stroufe informed her that Houchin Electric, a nonunion construction contractor, was working in the plant. He stated that the picketing was directed at Houchin and was purely informational. He emphasized that

it was not related to any violation by Gould of the collective bargaining contract covering the plant employees. He said he could not advise her or the other employees what to do and that any actions by the employees were "up to each individual, what they decide to do." Rec., vol. I, at 28.

During the morning break, Clifford Edgar called the attention of his fellow employees so that Beekman could relate what she had learned about the picketing. Beekman explained to the group what Stroufe had told her and advised the employees that "whatever action was taken it would be up to each individual, how they felt about what was going on." Rec., vol. I, at 33. Subsequently most of the employees walked out.

That afternoon the company sent a telegram to Stroufe and the employees in the bargaining unit, asserting that the strike not only violated the no-strike clause in the collective bargaining agreement but was an unlawful secondary boycott. The employees were warned that if they did not return to work the next day, they would be discharged.

Before Stroufe received the telegram, Jeff Ott, the employee representative on the second shift, called to inquire what to do. Stroufe told him to proceed with his second shift duties and the second shift went to work as scheduled. Ellis finally called Stroufe late that afternoon to discuss the morning walkout. Stroufe told Ellis he did not feel the contract had been violated "because Article 22 of the contract between IBEW and Gould pertained to the orderly settlement of grievances" and "there was no grievable offense that prompted the picket or the activity that followed." Rec., vol. I, at 114.

The next day all the first shift employees returned to the plant and all except Beekman and Edgar were put back to work without discipline. Beekman and Edgar received suspension let-

ters pending an investigation into their roles in what the Company termed an "illegal wildcat strike." Rec., vol. II, at 244. On March 10, Gould terminated them, stating they had led the walkout and violated the no-strike clause.

The Union filed unfair labor practices charges against Gould. It also filed grievances on behalf of the two discharged employees, which ended in arbitration prior to the unfair labor practice hearing. In his award, the arbitrator ignored the Union's contention that a no-strike clause such as Article XXII does not constitute a waiver of the right to engage in sympathy strikes. He simply assumed without explanation that the walkout violated Article XXII and focused his attention on the appropriate penalty. The arbitrator found the penalty of discharge to be excessive and reduced the discharges to sixty-day suspensions. The Company refused to comply with the arbitration award, asserting that the arbitrator was without authority to tamper with the penalty.

Notwithstanding its refusal to obey the arbitration award, Gould urges on appeal that the Board erred in failing to defer to the arbitrator's finding that the sympathy walkout violated the no-strike clause. In addition, Gould contends the sympathy walkout did not constitute protected concerted activity and, even if it did, the Union waived its right to engage in sympathy strikes by having agreed to the no-strike clause. We find these contentions without merit and affirm the Board's decision.

I.

Sections 7 and 8(a)(1) of the Act[1] protect the rights of employees to engage in "concerted activities . . . for mutual aid or protection." 29 U.S.C. §157. The threshold question here is whether the Gould employees' refusal to cross their fellow union members' picket line was protected under sections 7 and 8(a)(1).

An employee has a statutory right to honor any lawful picket line set up against his employer at his employer's place of business, *Delaware Coca-Cola Bottling Co. v. Teamsters Local 326,* ____ F.2d ____, 104 L.R.R.M. 2776 (3d Cir. 1980), even though the employee is not a member of the picketing union. *See, e.g., NLRB v. Difco Laboratories, Inc.,* 427 F.2d 170, 171-172 (6th Cir. 1970), *cert. denied,* 400 U.S. 833 (1970); *NLRB v. Southern Greyhound Lines,* 426 F.2d 1299, 1301 (5th Cir. 1970). Furthermore, an employee's refusal to cross a lawful picket line directed at a *stranger* employer at such employer's place of business is protected, *Teamsters Local 657 v. NLRB,* 429 F.2d 204 (D.C. Cir. 1970), even though the picket line is established by a stranger union. *NLRB v. Alamo Express, Inc.,* 430 F.2d 1032 (5th Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971).

Today, we must decide whether an employee has the right to honor the lawful picket line of his own union which is set up at his employer's place of business but is directed at a stranger employer doing work on the premises.[2] To deny this right "would be to hold that, although Congress protected the fundamental right of labor organizations to engage in primary picketing, it withheld this protection from the normal employee response which makes this right effective." *West Coast Casket Co.,* 97 N.L.R.B. 820, 823 (1951), *enf'd,* 205 F.2d 902 (9th Cir.

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[1] Section 7 provides in pertinent part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

29 U.S.C. §157. Section 8(a)(1) provides that it "shall be an unfair practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 . . . ." 29 U.S.C. §158 (a)(1).

1953). As the Fourth Circuit pointed out: "It cannot be denied that respect for the integrity of the picket line may well be the source of strength of the whole collective bargaining process in which every union member has a legitimate and protected economic interest." *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971). Consequently, we hold that the Gould employees' refusal to cross the picket line is protected concerted activity under section 7.[3]

Gould, however, argues that the Union waived this protection by agreeing to the no-strike clause contained in Article XXII of the Agreement. The Board disagreed, and "[i]f the Board's interpretation has a reasonable basis in the contract terms, the Act's policies and the Board's expertise, it is entitled to deference." *NLRB v. C. K. Smith & Co.*, 569 F.2d 162, 167

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[2] On appeal, Gould also argues that the picketing itself was unlawful. Earlier it filed separate charges against the Union alleging that the picketing violated sections 8(b)(4) and 8(b)(7)(c) of the Act. 29 U.S.C. §§158(b)(4), 158(b)(7)(c). However, after investigating the charges, the Regional Director found them without merit and refused to issue a complaint.

We agree that Gould's argument is without merit. This court has upheld peaceful picketing at the premises of a neutral employer where the record supports a conclusion that the picketing was for informational purposes and not for the purpose of inducing neutral employees to take concerted action against their employer. *NLRB v. International Union of United Brewery Workers*, 272 F.2d 817 (10th Cir. 1959). Here, there is substantial evidence to support the Administrative Law Judge's (ALJ) findings that the walkout was the spontaneous action of the Gould employees and was not directed or induced by the Union within the meaning of section 8(b)(4)(i) of the Act. *Compare Electrical Workers Local 501 v. NLRB*, 341 U.S. 694 (1951), with *Building & Construction Trades Council (Tampa Sand & Material Co.)*, 132 N.L.R.B. 1564, 1565-66 (1961). Furthermore, there is substantial evidence to support the ALJ's conclusion that the Union made no threat of economic reprisal to force Gould to stop doing business with the nonunion contractor, as required by section 8(b)(4)(ii). Finally, in view of the evidence that the picketing was intended to inform the public and did not have a substantial disruptive effect, the ALJ properly found it was lawful under section 8(b)(7)(c) of the Act. *See Barker Brothers Corp. v. NLRB*, 328 F.2d 431, 436-37 (9th Cir. 1964).

(1st Cir. 1977), *cert. denied,* 436 U.S. 957 (1978).

Although the right to honor picket lines and engage in sympathy strikes may be waived by agreement, *NLRB v. Rockaway News Supply Co.,* 345 U.S. 71 (1952), "clear and unmistakable" language is required to effect such a waiver. *E.g., Delaware Coca-Cola Bottling Co. v. Teamsters Local 326,* ____, 104 L.R.R.M. at 2780; *Newspaper Production Co. v. NLRB,* 503 F.2d 821, 830 (5th Cir. 1974); *Kellog Co. v. NLRB,* 457 F.2d 519, 525 (6th Cir.), *cert. denied,* 409 U.S. 850 (1972). Here, the contract does not expressly prohibit sympathy strikes, and no evidence was presented to suggest the parties intended such a prohibition.[4] Consequently, under the prevailing rules for interpreting general no-strike clauses, we are unable to infer from the language of Article XXII a waiver of the right to engage in sympathy strikes.

Moreover, when construing a no-strike clause, we must bear in mind that "a no-strike obligation is the quid pro quo for

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[3] We note, however, that an employee's right to refuse to cross a lawful picket line at his employer's place of business is not unlimited. The employer cannot simply discharge employees for engaging in such protected activity, but the employer may hire permanent replacements for those employees when justified by substantial and legitimate business considerations. *NLRB v. Union Carbide Corp.,* 440 F.2d 54 (4th Cir.), *cert. denied,* 404 U.S. 826 (1971); *NLRB v. Southern Greyhound Lines,* 426 F.2d 1299 (5th Cir. 1970). *See generally NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967). For example, in order to continue operations, an employer may replace workers who refuse to cross a picket line. *Union Carbide,* 440 F.2d at 57. *Southern Greyhound Lines,* 426 F.2d at 1301. Gould does not contend here that the discharge of Beekman and Edgar was justified under this doctrine.

[4] This case is thus distinguishable from cases where extrinsic evidence was offered to prove that the no-strike clause was intended to prohibit sympathy strikes. *See NLRB v. Rockaway News Supply Co.,* 345 U.S. at 79-80; *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters,* 597 F.2d 1138, 1144 (8th Cir.), *cert. denied,* 100 S.Ct. 79 (1979); *News Union v. NLRB,* 393 F.2d 673, 678 (D.C. Cir. 1968).

an undertaking by the employer to submit grievance disputes to the process of arbitration." *Boys Market, Inc. v. Retail Clerks Local 770,* 398 U.S. 235 (1970). Accordingly, "[a]bsent an explicit expression of [another] intention . . . the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." *Gateway Coal Co. v. UMW,* 414 U.S. 368, 382 (1974). *See also Delaware Coca-Cola Bottling Co.,* ____ F.2d at ____, 104 L.R.R.M. at 27779-80. Here Article XXII makes clear that the reach of the no-strike clause is tied to the grievance procedure. It specifies that the no-strike pledge is given "[i]n view of the procedure for the orderly settlement of grievances provided under the terms of this agreement . . . ." Rec., vol. II, at 237. This language suggests that if the dispute underlying a strike is not subject to the grievance-arbitration machinery of the contract, the strike is not prohibited by the no-strike clause.

Article XX, Section 2 of the contract provides further indication that the grievance-arbitration procedure is intended to resolve only grievances about a claimed "misapplication or violation of a specific provision of [the] agreement . . . ." Rec., vol, II, at 234-35. The parties agree that the dispute underlying the sympathy walkout, *i.e.,* the Union's construction division dispute with Houchin, had nothing to do with the collective bargaining agreement between Gould and the Union's manufacturing division and was, therefore, not arbitrable. Thus, as the Administrative Law Judge pointed out, "[s]ince neither the cause of, nor the issue underlying, the sympathy strike are *[sic]* subject to the settlement procedures of the contract, a ban on the sympathy strike may not be implied." Rec., vol. III, at 667-68. *Accord, Delaware Coca-Cola Bottling Co.,* ____ F.2d ____, 104 L.R.R.M. 2776; *C. K. Smith & Co.,* 569 F.2d 162; *Hyster Co. v. Independent Towing & Lifting Machine Associa-*

tion, 519 F.2d 89 (7th Cir. 1975), *cert. denied,* 428 U.S. 910 (1976).

In *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 400 n. 2 (1976), the Supreme Court addressed the related question whether a sympathy walkout may be enjoined when the collective bargaining agreement between the parties contains a general no-strike clause that does not specifically address sympathy strikes, and an arbitration provision that limits arbitrable disputes to grievances involving "question[s] as to the meaning and application of the provisions of this Agreement." The Court held that the sympathy strike could not be enjoined since

> "the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer, neither its causes nor the issues underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain."

Id. at 407-408.

In *NLRB v. Keller-Crescent Co.,* 538 F.2d 1291, 1296 (7th Cir. 1976), the court read *Buffalo Forge* as suggesting that the employees were contractually bound to arbitrate the legality of a sympathy stike *before* engaging in it. However, *Keller-Crescent* is readily distinguishable from this case. There, a section of the contract dealt specifically with the employees' rights to honor picket lines established by other locals of their own union. The picket line which the employees honored did not fall into the permitted category. Accordingly, the company successfully argued that by expressly permitting one type of sympathetic ac-

tivity in the contract the parties had manifested an intention to prohibit other types of sympathetic activites. *See also W-I Canteen Service, Inc. v. NLRB*, 606 F.2d 738, 745-46 (7th Cir. 1979). There is no question that the existence of the picket line clause persuaded the court that the employees had little basis for believing they had the legal right to honor the picket line, and therefore should have arbitrated the question before they refused to cross it.[5] In contrast, the contract here is totally silent on the subject of picket lines. The express link between the no-strike clause and the contractual settlement procedures makes inescapable the inference that only strikes over arbitrable issues were intended to be proscribed.

We hold that the Board properly refused to infer a waiver of the employees' right to engage in sympathetic activity protected by section 7.

II.

Although Gould refused to comply with the Arbitrator's award, which directed that Beekman and Edgar be reinstated after sixty-day suspensions, Gould strenuously argues on appeal that the Board erred in failing to defer to the arbitrator's assumption that Article XXII prohibits sympathy walkouts.[6] We disagree.

Section 10(a) of the Act empowers the Board to prevent un-

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[5] This conclusion is bolstered by the fact that the court distinguished an earlier Seventh Circuit case, *Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975), on the ground that the collective agreement at issue there lacked a picket-line clause. In *Gary Hobart*, it was held that sympathy strikers did not violate a general no-strike clause under essentially the same analysis we have followed here. In *Keller-Crescent Co.*, the court expressly acknowledged the continued vitality of the *Gary Hobart* holding.

fair labor practices and provides that this power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . . ." 29 U.S.C. §160(a). Thus, in an unfair labor practice case, the Board is not deprived of jurisdiction to decide an issue which has previously been the subject of an arbitration award. In *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964) the Court noted:

> " *'There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held.* However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.' " *Id.* at 271 (quoting *International Harvestor Co.*, 138 N.L.R.B. 923, 925-26 (1962)) (emphasis added).

In the interest of promoting industrial peace and avoiding duplicative litigation, the Board with judicial approval has voluntarily deferred to arbitration awards where the arbitration procedure was "fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Spielberg*

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[6] Gould contends the arbitrator was without authority to modify any penalty imposed by the Company for Article XXII violations. The arbitrator construed the language of Article XXII to allow him to do precisely that. Thus, Gould finds itself in the curious position of arguing that the Board abused its discretion by rejecting the arbitrator's interpretation of Article XXII to prohibit sympathy walkouts, even though Gould itself has steadfastly refused to comply with the arbitrator's award on the ground that he misconstrued another part of the same Article.

Manufacturing Co., 112 N.L.R.B. 1080, 1082 (1955). *See Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 270-71 1964); *NLRB v. Auburn Rubber Co.*, 384 F.2d 1, 3 (10th Cir. 1976). At least two circuits would add two additional requirements to the *Spielberg* test: (1) that the arbitrator *clearly decided* the unfair labor practice issue on which the Board is later urged to give deference and (2) that the arbitrator decided only issues within its competence. *See Stephenson v. NLRB,* 550 F.2d 535, 538 (9th Cir. 1977); *Banyard v. NLRB,* 505 F.2d 342, 347 (D.C. Cir. 1974).

The Board has wide discretion in deciding whether deferral to an arbitration award is appropriate under these standards. Upon review, we are limited to the question whether the Board abused its discretion in reaching its deferral decision. *Hawaiian Hauling Service, LTD v. NLRB,* 545 F.2d 674, 676 (9th Cir.), *cert. denied,* 431 U.S. 965 (1976); *NLRB v. Horn & Hardart Co.*, 439 F.2d 674, 679 (2d Cir. 1971). In *NLRB v. Auburn Rubber Co., Inc.*, 384 F.2d at 3, this court said: "[T]he Board has the discretion to defer to, or to reject, the decision of the arbitrator and, in determining whether the discretion has been properly exercised, the tests announced in Spielberg are pertinent." Relying on *Spielberg,* the Board here determined that the arbitrator's decision should not be honored. We find no abuse of discretion in the Board's refusal to defer.

Although the Union argued before the arbitrator that sympathy strikes were protected activity and that general no-strike clauses do not automatically effect a waiver of sympathetic rights, the arbitrator failed to address these issues. He assumed without discussion that the sympathy walkout was "an illegal strike," and devoted his opinion to explaining why Beekman and Edgar could legitimately be singled out for some punishment short of discharge. Rec., vol. II, at 602. As we have

previously noted, no extrinsic evidence was presented to the arbitrator to support the conclusion that the parties intended the no-strike clause to cover sympathy strikes.

The employees' statutory right to strike lies "at the core" of the Congressional scheme for promoting collective bargaining. *Division 1287, Motor Coach Employees v. Missouri,* 374 U.S. 74, 82 (1963); *NLRB v. Eric Resistor Corp.,* 373 U.S. 221, 234-235 (1963). The Board need not defer to an arbitral decision which is inconsistent with the policies underlying section 7, and which is thereby repugnant to the purposes and policies of the Act. *NLRB v. Owners Maintenance Corp.,* 581 F.2d 44, 48 (2d Cir. 1978); *Dreis & Krumpf Manufacturing Co., Inc. v. NLRB,* 544 F.2d 320, 330 (7th Cir. 1976).

In particular, where an arbitrator's award clearly ignores a long line of Board and court precedent, the Board's refusal to defer to the award under *Spielberg* is proper. *Alfred M. Lewis, Inc. v. NLRB,* 587 F.2d 403, 407-08 (9th Cir. 1978); *Radio Television Technical School, Inc. v. NLRB,* 488 F.2d 457 (3d Cir. 1973). In this case, the arbitrator assumed that a general no-strike clause *ipso facto* effected a waiver of the right to engage in sympathy strikes, despite the lack of any extrinsic evidence to support that conclusion.[7] Under these circumstances, we conclude the Board properly refused to honor the award as repugnant to the purposes and policies of the Act. *See Dreis & Krumpf Manufacturing Co. v. NLRB,* 544 F.2d at 330.

ENFORCEMENT GRANTED.

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[7] *NLRB v. Pincus Brothers, Inc.,* 620 F.2d 367 (3d Cir. 1980), is distinguishable from this case. There, the arbitrator upheld the discharge of an employee for distributing leaflets containing allegedly false statements about the company. The court held that the Board erred in refusing to defer to the award because "it appears at least arguable that [the employee's] leaflet can be

No. 79-1025

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
NOV 07, 1980
HOWARD K. PHILLIPS
Clerk

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

GOULD, INC., SWITCHGEAR DIVISION
Respondent

JUDGMENT

Before Barrett, Peck* and Seymour, Circuit Judges.

THIS CAUSE was heard upon application of the National Labor Relations Board for the enforcement of a certain order

Footnote 7 *(Cont.)*

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labeled as 'defamatory or insulting material known to be false,' *Linn v. Plant Guard Workers,* 383 U.S. 53, 61, 86 S.Ct. 657, 662, 15 L.Ed.2d 582 (1966), and thus can be characterized as unprotected under the Act." *Id.* at 376. The court emphasized: "We hold only that where there are two arguable interpretations of an arbitration award, one permissible and one impermissible, the Board must defer to the decision rendered by the arbitrator." *Id.* at 377. Here, the sympathy strike is not even arguably unprotected. As stated above, it is well settled that a general no-strike clause does not operate to waive the right to engage in sympathy strikes absent some extrinsic evidence that the parties so intended.

issued by it on September 28, 1978 against Respondent, Gould, Inc., Switchgear, Division, Tulsa, Oklahoma, its officers, agents, successors and assigns. On October 7, 1980, having considered the record, briefs and argument of counsel, and being fully advised in the premises, the Court handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged that the said order of the National Labor Relations Board be enforced, and that Gould, Inc., Switchgear Division, Tulsa, Oklahoma, its officers, agents, successors and assigns, abide by and perform the directions of the Board contained in said order.

S/S Stephanie K. Seymour
Judge, United States Court of Appeals for the Tenth Circuit

Dated: November 4, 1980

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*Of the United States Court of Appeals, Sixth Circuit, sitting by designation.

By: S/S Vicki Edmisson
Deputy Clerk

APPENDIX B

NOVEMBER TERM – DECEMBER 18, 1980

Before The Honorable Oliver Seth, Chief Circuit Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable John Peck, United States Court of Appeals for the Sixth Circuit.

No. 79-1025

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GOULD, INC., SWITCHGEAR DIVISION
(formerly Terac Controls, Inc.),
Respondent.

This matter comes on for consideration of respondents' petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Barrett, Seymour and Peck to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular service on the Court having requested that the Court be polled on rehearing in banc, Rule 35,

Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

By:
Robert L. Hoecker
Chief Deputy Clerk

APPENDIX C

238 NLRB No. 88

FMT
D–4283
Tulsa, Okla.

Case 16–CA–7061

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GOULD INC., SWITCHGEAR DIVISION
(formerly Terac Controls, Inc.)

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION 584

DECISION AND ORDER

On May 31, 1978, Administrative Law Judge Herzel H. E. Plaine issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in the light of the exceptions and briefs[1] and has de-

[1] Respondent has requested oral argument. This request is hereby denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

cided to affirm the rulings, findings, and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

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[2] For the reasons fully set forth by him, we agree with the Administrative Law Judges's finding that Respondent violated Sec. 8(a)(1) of the Act by discharging employees Virginia Beekman and Clifford Edgar because they participated in a sympathy walkout which, in the circumstances, was a protected concerted activity. Having found, in agreement with the Administrative Law Judge, that the employees' sympathy walkout was a protected concerted activity, we do not reach the question (discussed by the Administrative Law Judge at fn. 7a of his Decision) of whether Respondent's willingness to accept the returning strikers without discipline constituted condonation of their asserted misconduct. Also, in view of our finding that the discharges violated Sec. 8(a)(1) of the Act, we deem it unnecessary to pass on the Administrative Law Judge's further finding that the discharges also violated Sec. 8(a)(3) of the Act, inasmuch as such additional finding could not affect the remedy herein. Finally, in view of our agreement with the Administrative Law Judge's finding that the strike was a protected concerted activity, *Precision Castings Company Division of Aurora Corporation, a wholly owned subsidiary of Allied Products Corporation,* 233 NLRB No. 35 (1977), is inapplicable, since that decision concerned only unprotected activity.

Although the Administrative Law Judge correctly found that the doctrine of *Redwing Carriers, Inc., and Rockana Carriers, Inc.,* 137 NLRB 1545 (1972), afforded Respondent no defense to its discharge of Beekman and Edgar, and is inapplicable to the facts herein, he failed to note the Board's recent decision in *Torrington Construction Company, Inc.,* 235 NLRB No. 211 (1978), which holds that while a sympathy striker may be replaced when necessary to the continued operation of the employer's business, such striker may not lawfully be discharged.

Finally, we agree with the Administrative Law Judge that deferral to the arbitrator's award is not appropriate in these circumstances, but not with his characterization of this proceeding as looking to "vindication of individual rights under the Act" inasmuch as the Board's processes function only in vindication of the public interest even though the statutory rights of individual employees may be involved. However, in finding deferral inappropriate, we do not rely on *General American Transportation Corporation,* 228 NLRB 808 (1977), inasmuch as the arbitrator's award has already issued in this case. Instead, we find that the arbitration award does not meet the standard of *Spielberg Manufacturing Company,* 112 NLRB 1080 (1955), for the reasons set forth in *Raytheon Company,* 140 NLRB 883 (1963), enforcement denied on other grounds 326 F.2d 471 (C.A. 1, 1964).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Gould Inc. Switchgear Division (formerly Terac Controls, Inc.) Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. September 28, 1978.

John H. Fanning, Chairman

Betty Southard Murphy Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD-370-78
Tulsa, Oklahoma

Case No. 16-CA-7061

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GOULD INC., SWITCHGEAR DIVISION
(formerly Terac Controls, Inc.)
Respondent

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION 584
Charging Party

KATHLEEN D. AURE, ESQ.,
Fort Worth, Texas,
for the General Counsel.

RICHARD L. BARNES, ESQ.,
of KOTHE, NICHOLS AND WOLFE, INC.,
Tulsa, Oklahoma,
for the Respondent.

THOMAS F. BIRMINGHAM, ESQ.,
of SMITH, BROWN, MARTIN AND ADKISSON,
Tulsa, Oklahoma,
for the Charging Party.

DECISION

HERZEL H. E. PLAINE, Administrative Law Judge:

The question presented is whether Respondent, a manufac-

turer of electrical switchgear, violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging the two employees, of its bargaining unit of manufacturing employees, who were the two elected union representatives of the unit represented by the Charging Party (Union). The two employees had participated with most of the other employees in a walkout and brief strike of several hours, allegedly in sympathy for the division of construction employees of the Union who were conducting informational picketing against a non-union contractor doing electrical construction for Respondent in an expansion of the manufacturing plant in which the manufacturing employees worked.[1]

The union contract governing the relationship between Respondent and its manufacturing employees contains a no-strike clause tied to the procedure for the orderly settlement of grievances arising within the terms of the contract. The Union and General Counsel are of the view that such clause is a limited ban on strikes over matters subject to the grievance procedure, and does not expressly or impliedly prohibit the employees from engaging in sympathy strikes, under the reading of *Buffalo Forge Co. v. United Steelworkers of America,* 428 U.S. 397, 407-408 (1976). Hence General Counsel and the Union contend that the sympathy strike was protected activity under the Act and that the discharges for engaging in it were unlawful.

Further, General Counsel and the Union contend that the sympathy strike was spontaneous, individual action of the employees not directed by the Union or its agents or the two elected representatives among the employees, and that the discharges of only the two elected union representatives from among all of the striking employees were discriminatory.

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[1] Complaint was filed on May 19, 1977, on a charge filed by the Union on March 3, 1977.

Respondent contends that the strike action of its manufacturing employees was unlawful and unprotected because they had no labor dispute with Respondent, and because the Union purpose behind its informational picketing of the nonunion electrical construction contractor was to cause a work stoppage by the manufacturing employees, in violation of Section 8(b)(7) of the Act, with the objective of forcing Respondent to stop doing business with the nonunion electrical construction contractor, in violation of Section 8(b)(4) of the Act.

Respondent also claims that since its employees engaged in strike activity forbidden by the collective bargaining contract they were subject to discipline, including discharge, under the contract, and that Respondent enjoyed discretion to choose for discharge those employees whom it regarded as having special culpability in the forbidden action, in this case the two elected representatives of the employees.

The matter of the discharges had been referred to arbitration before trial of the case at bar. Respondent argues that the arbitrator found that the two discharged employees violated the collective bargaining contract and that the Board should defer to that finding.

Actually, the arbitrator assumed that the two discharged employees had breached the collective bargaining contract and concerned himself only with whether discharge was too severe a penalty. He found that the discharges were too sever a penalty for the breach and commuted the discharges to sixty-day suspensions.

Respondent claims that the arbitrator had no authority to modify the penalty which Respondent had invoked, and at the time of trial of this case, Respondent had not complied with arbitrator's award. Therefore, Respondent has not asked that the

Board defer to the arbitrator's award but has moved for deference only to the alleged finding therein that the collective bargaining contract was breached by the two employees. General Counsel and the Union oppose such deference.

The case was tried in Tulsa, Oklahoma on July 21, 1977. Counsel for all three parties have filed briefs.

Upon the entire record of the case, including my observation of the witnesses and consideration of the briefs, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a corporation with an office and place of business in Tulsa, Oklahoma, where it is engaged in the manufacture of electrical switchgear and components.

In the calendar year prior to filing the complaint, a representative period, Respondent sold and shipped finished products, valued in excess of $50,000, directly to customers outside Oklahoma.

As the parties admit, Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

As the parties also admit, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. Respondent's Business and Union Relationship

Respondent manufactures electrical switchgear in its Tulsa plant, and for this purpose uses largely electricians, and some welders, sheet metal workers and related personnel.

There are two shifts, the early shift commencing at 7:30

a.m. and the late shift commencing at 4 p.m. The early shift has about 90 employees, the late shift about 30 employees.

In overall charge of plant is General Manager Donaldson. Shop Superintendent is Adam Bellis, who answers to the general manager, and under Bellis are several foremen, including Shop Foreman Donald Purkey and Electrical Foreman Grover Whitten. The Director of Personnel is Louis Ellis, who is also in charge of labor relations. All of the foregoing are admitted statutory supervisors or agents with authority to speak for and on behalf of Respondent.

Respondent's manufacturing employees comprise a bargaining unit that has been represented for a number of years by the Union – Local 584 – under a collective bargaining contract with Respondent.

The Union local's chief representative is its Business Manager Clinton Sroufe. According to Sroufe, the Union's territorial jurisdiction in Oklahoma is large, stretching from the Kansas line to below McAllister, Oklahoma, and from Stroud, Oklahoma to the Arkansas border. Sroufe testified that the Union comprises three autonomous divisions of workers: construction, manufacturing, and maintenance, and no one division votes on the business of the others. Respondent's bargaining unit employees belong to the manufacturing division of the Union.

Apart from its professional union representation, the bargaining unit had two elected representatives, Shop Steward Virginia Beekman, a class A electrician, and bargaining unit Chairman Clifford (Toby) Edgar, a class A welder.

At the time of the events in this case, the plant operations were all on one floor, with a mezzanine floor for offices and an employees' lunchroom. Respondent had embarked upon a plant

expansion and remodeling and for this purpose was using construction contractors including an electrical construction contractor. Prior to February 28, 1977, the electrical contractor for some of the work was Stewart Electric Co., which had a collective bargaining agreement with the Union, and whose employees were members of the Union's construction division. On about February 28, 1977, Respondent brought in a nonunion electrical contractor, Houchin Electric Co., for work on which Houchin had underbid Stewart. Houchin was a comparatively small electric construction contractor who used about two to four men on the job at the plant.

On March 1, 1977, the Union set up an informational picket at the plant on behalf of the members of its construction division.

The picket sign read:

"Information: Houchin Electric does not have an agreement with Local Union 584, IBEW."

B. The Union Contract

The collective bargaining agreement between the Union and Respondent, exhibit GC-2, effective November 11, 1975 through November 10, 1978, covered the plant employees (other than office employees, clericals, guards, and professionals), largely made up of manufacturing electricians, and some welders, sheet metal workers, painters, inspectors, stockroom employees, and janitors.

Among other things, the agreement had a grievance procedure, coupled with compulsory arbitration of grievances not satisfactorily settled, Article XX. To be arbitrable, a grievance must allege misapplication or violation of a specific provision of the agreement and is limited to subject matter expressly contained in the agreement, Article XX, Section 2.

The agreement also provided:

ARTICLE XXII – STRIKES AND LOCKOUTS

In view of the procedure for the orderly settlement of grievances provided under the terms of this Agreement, the Union agrees that there will be no strike, work interference, or other stoppage or slowdown of work, total or partial, during the term of this Agreement.

An employee or employees who participate in any such action in violation of this Agreement may be disciplined or discharged from the Company's service, subject to the employee's right to submit a grievance alleging improper discharge in accordance with the provisions of Article XX, Section 3, paragraph (c) of this Agreement.

The Union agrees that it will take immediate, positive action to forestall or suppress any action on the part of employees in violation of this Agreement.

The Company will not lock out any employee or employees while this Agreement is in force.

C. The Walkout

According to Respondent's Personnel Director Ellis, the informational picketing at the plant, directed at Houchin Electric Co., began on March 1, 1977, after 9 a.m. There were two pickets, one of them an assistant business manager of the Union and one carrying the picket sign, see heading A above, which Ellis read.

The manufacturing employees became aware of the picketing between 9 a.m. and 9:30 a.m. Employee Harold Webber told Shop Steward Virginia Beekman of it. She then saw it for herself and went to the telephone about 9:30 a.m. to ask Union Business Manager Sroufe what it was about and what to do about it.

Union Business Manager Sroufe told Shop Steward

Beekman that a nonunion electrical construction contractor (Houchin) with nonunion employees was working in the plant, that the picketing was informational picketing directed at Houchin and did not involve a violation by Respondent of its collective bargaining contract covering the plant employees, that the Union was not going to tell or advise her or the other employees what to do, and that any actions by employees would have to be their individual actions.

Word of the picketing spread through the plant and, at 10 a.m., most of the morning shift employees gathered in the lunchroom, as was not unusual, for the fifteen-minute morning coffee and refreshment break. The gathering was unusually noisy, according to employees Stack, Beekman (the shop steward), and Edgar (the unit chairman), since, in addition to getting and consuming refreshments, the employees were discussing the picket, what to do about it, whether to walk out or continue working behind the picket line, or whether they were obliged to do one or the other. Unit Chairman Edgar succeeded in getting attention of the gathering long enough to have Shop Steward Beekman explain what she had learned about the picketing, and she concluded by saying any employee reaction would be up to each of them as individuals.

Some of the employees talked of walking out of the plant at once, according to Unit Chairman Edgar and Shop Steward Beekman. Beekman testified that she did not get into the discussion of, or advise, a walkout. Edgar testified that he did not advise against a walkout but said that the employees ought to wait until 4 p.m. (the end of the day shift) to give Respondent and the Union time to talk and avoid a walkout. Though there was no organized meeting in progress, employee John Burgess made a motion to walk out at 4 p.m., quitting time, unless the Union and Respondent had worked things out before then. There was

a voice vote of approval, and some employees started leaving the lunchroom presumably for their work places.

However, others stayed on and despite the vote talked about an immediate walkout because there were employees who would be going out and returning to the plant during the day on business errands or lunch, causing them to cross the picket line in returning for work. A second voice vote was taken, by the lesser number of employees still in the lunchroom, and this time the vote was to walk out of the plant immediately.

It was now approximately between 10:10 a.m. and 10:15 a.m. The bell rang signaling coffee break was about to end and time to return to work. The employees in the lunchroom, on the mezzanine floor, started moving to and down the stairway to the ground floor shop area. They apparently halted uncertainly at the foot of and on, the stairway because, said Unit Chairman Edgar, employees were there who were unaware of the second vote in the lunchroom. Further confused discussion ensued on the conflicting views and votes already taken, and, according to Edgar Doug Dodwell broke through the discussion with a motion to walk out now, which was approved by voice vote.

Nonetheless, said Unit Chairman Edgar, the employees hesitated and stood where they were. Employee Stack described it as an emotional situation in which the employees wanted to do something, but with no one among them taking the initiative to start.

At this point Foreman Whitten approached the assembled employees at the stairway. Whitten testified that, at the direction of Personnel Director Ellis, he announced that those employees who had punched out (or clocked out) were to leave and those who had not were to go back to work. None of the employees had punched out or clocked out—and Whitten testi-

fied that he later verified this to be the fact – but when he made his announcement, said Whitten, the whole group of employees moved to the timeclock, clocked out, and left the plant. As employee Stack testified, corroborating Foreman Whitten's description,, Whitten's statement to the employees had the effect of supplying the initiative for them to do something, and they walked out.

Almost all of the 90 employees on the shift walked out, testified Shop Superintendent Bellis, and when he observed a half-dozen employees who had not left, he told them they might as well go home too, and sent them home.

In this connection, the evidence indicated that the plant management made scant, if any, effort to try to head-off or avoid the walkout. Shop Superintendent Bellis testified that he had been made aware of the gathering in the lunchroom and the talk of walkout, had personally observed the (third) vote to walk out taken at the stairway, but made no attempt to talk to the employees about going back to work or the possible consequence of not doing so, or of talking to Unit Chairman Edgar whom he saw among the employees at the stairway. Bellis did walk over to the telephone, behind and away from the stairway, where Shop Steward Beekman had gone from the lunchroom (without participating in the stairway gathering) to report to Union Business Manager Sroufe on what had occurred at the lunchroom gathering. Bellis interrupted her phone conversation to ask what was going on. She replied the employees had voted to honor the picketing outside the plant. Bellis answered that the picketing had nothing to do with the employees, or their union contract, and they were subjecting themselves to discharge. Beekman handed Bellis the telephone and he took over the conversation with Sroufe. Sroufe agreed with Bellis that the picket line had nothing to do with the union contract of

Respondent's unit employees, and asked Bellis to have General Manager Donaldson or Personnel Director Ellis get in touch with him to resolve the problem before it came about. Ellis did not call Sroufe until about 4 p.m., approximately six hours later.[2]

Shop Steward Beekman and Unit Chairman Edgar were the last of the employees to walk out. Edgar had walked over to Beekman at the telephone to inform her of the third vote at the stairway. Neither of them had advised their fellow employees against voting or against walking out but Beekman had not voted in any of the three employee votes, she said, and Edgar said he had voted in all three. Beekman testified she saw five or six employees still in the shop at the timeclock when she punched out (these were the few employees whom Shop Superintendent Bellis then sent home). Bellis and some of his supervisors were also at the clock, and Bellis asked her if she knew that the employees who had walked out could be discharged. She replied, they made their decision, and left the plant.

In connection with the March 1 walkout, Union Business Agent Sroufe testified that at no time did he or the Union give any instructions or directions to anyone for a walkout or strike action. He noted that in December 1976 he had heard, from a union member and employee of the union construction contractor Stewart Electric, that nonunion construction contractor Houchin Electric might be getting some of Respondent's plant

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[2] Personnel Director Ellis had also been fully aware of the actions of the employees as they occurred in the morning of March 1. Like Shop Superintendent Bellis, he too made no effort to head off the walkout or advise employees of possible consequences, but merely directed Foreman Whitten to make the statement he made, *supra*.

Interestingly, the arbitrator in his award, appeared to regard the Whitten statement as an invitation for a mass exodus of the employees.

expansion work that Stewart thought it had; and that he, Sroufe, asked Personnel Director Ellis about it. Ellis said he had nothing to do with contract awards but would find out. However Ellis provided Sroufe with no advance information,[3] and Sroufe tried in vain to obtain information from General Manager Donaldson.

At the monthly union meeting of Respondent's bargaining unit employees, in January 1977, Sroufe said he mentioned that he had heard of the possibility of the nonunion contractor getting some of Respondent's electrical construction work but, according to Sroufe and several employees who testified, he added no more other than that he could probably work out any problem with Respondent. Sroufe said he had no meeting or discussion with any of Stewart's management and learned that Houchin had obtained the work when Houchin's men started working at the plant at the end of February.

Sroufe further testified that for about two years prior to trial the Union had been engaged in organizing employees of electrical construction employers and had a two-year history of informational picketing of such employers whose employees were not unionized. Because the Union had been concentrating on the larger employers, said Sroufe, there had been no informational picketing of Houchin Electric, a small operator, prior to the picketing that began March 1, 1977, at Respondent's plant.

The informational picketing of Houchin lasted thirteen days, according to Sroufe, from March 1 through March 13, 1977. Beginning on the second day of the picketing, after the sympathy walkout and strike of Respondent's manufacturing

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[3] Ellis did tell Sroufe, a week after the March 1, 1977 walkout, that Houchin had underbid Stewart, by a considerable amount, for the particular job.

employees had ended, Respondent had the Houchin employees use a reserved gate of their own which they erected the previous day, said Sroufe. Shop Steward Beekman testified that she observed that the picket moved to the new location on March 2.

D. The Employees Return to Work

In the afternoon of the walkout on March 1, 1977, Respondent sent a telegram to Union Business Manager Sroufe and caused copies to be delivered to each of the bargaining unit employees, exhibit CP-1.

In the message, Respondent stated that the strike was an unlawful secondary boycott and was a violation of Article XXII of the collective bargaining agreement. Each of the employees was told if he did not report to his or her next regularly scheduled shift, he or she would be subject to discharge, as provided in Article XXII; and the Union was called on to take immediate positive action to return the employees to work.

Union Business Manager Sroufe testified that before he received his copy of the telegram in the afternoon of March 1, he had been called about 4 p.m. by employee Jeff Ott the employee representative on the second or late shift, who had observed the absence of first shift employees and was inquiring what to do. Sroufe said he told employee Ott that there had been picketing earlier in the day, that he was told the first shift employees left the plant, that the picketing had no relation to the employees collective bargaining contract, and that Ott should proceed with the second shift duties. Sroufe also testified that he talked to day or first shift employees and advised them to report to work at their next regularly assigned shift.

The second shift went to work as scheduled on March 1, and next morning, March 2, all of the first shift returned to work as scheduled, and the strike ended. The Union's informa-

tional picketing at the newly set up reserved gate for Houchin Electric continued from March 2 through March 13.

In the late afternoon of March 1, Personnel Director Ellis finally responded to Union Business Manager Sroufe's morning request to call Sroufe. They discussed the morning walkout of the employees and whether the collective bargaining contract had been violated. Sroufe contended that Article XXII of the contract pertained to the orderly settlement of grievances under the contract, that there was no grievable offense under the contract that prompted the Union's picket or the employee activity that followed, and therefore since the contract does not bar sympathy strikes, the employees committed no violation of the contract. Ellis asked what would the Union position be if Houchin Electric was not there, and Sroufe answered, there would have been no need for a picket if Houchin were not there.

As a result of the March 1 walkout and strike Respondent filed unfair labor practices charges against the Union, charging violations of Section 8(b)(4)(i), Section 8(b)(4)(ii)(A) and (B), and Section 8(b)(7)(C) of the Act. Following investigations of the charges, the Regional Director found further proceedings unwarranted and refused to issue complaints against the Union, see exhibits CP-2-3-4-5.

E. The Discharges of Employees Beekman and Edgar

When the day shift employees reported to work on the morning of March 2, all were put back to work without discipline or talk of discipline for the walkout on March 1, except Shop Steward Beekman and Unit Chairman Edgar. The two employees were interviewed separately by Personnel Director Ellis with several supervisors present and interrogated about the walkout. Both were handed suspension letters, already prepared, charging each with a substantial role in the strike of

March 1 and removing them from the payroll, exhibits GC-3 and -5. Both were sent home.

Following a further separate meeting for each of them with management representatives, employees Beekman and Edgar were discharged as of March 1 by letters dated March 10, 1977, exhibits GC-4 and -6. Both were charged with being the leaders of the work stoppage on March 1. Added in, was a charge of having violated company rules, i.e. refusing to return to work despite a foreman's direct order (which was identified at trial as the Whitten statement made to all employees to leave if clocked out or return to work) and being absent from duty for the six hours on March 1.

While none of Respondent's witnesses testified as to the discharges, it was made plain by Respondent that it had determined that these two employees "had a special responsibility and higher duty" than the other employees (by virtue of being the elected shop steward and unit chairman, respectively), and therefore should be disciplined rather than the 83 or 84 other employees "who may have been misled by their actions or inaction," transcript, page 10.

The Union filed grievances on behalf of the two discharged employees, which went to arbitration. In his award, the arbitrator, though he copied down the arguments of the Union and Respondent, assumed without explanation that the walkout was a violation of the collective bargaining contract and dealt only with whether the discipline of discharge invoked by Respondent was too severe. He found that the discipline was too severe and reduced the discharges to sixty-day suspensions, exhibit GC-7. At the time of trial, Respondent had not complied with the award and had not reinstated the two employees, contending that the arbitrator had no authority to modify the discharge penalty.

F. Concluding Findings

1. Protected Activity

The employee walkout and six-hour work stoppage of March 1, 1977, by Respondent's unionized manufacturing employees, was in sympathy for the construction employee members of the union, who had begun informational picketing, that morning, of a nonunion electrical construction contractor engaged in work for Respondent with nonunion employees at Respondent's plant.

The walkout was the spontaneous action of about 85 of the 90 first shift employees, who decided in unorganized assemblages in the plant that they would not work behind the picket line. The decision and action was not directed by the Union, whose Business Manager Sroufe advised the shop steward and through her the employees that whatever action the employees took would be their individual choice and action. Such advice does not constitute union authorization, or union inducement within the meaning of Section 8(b)(4)(i) of the Act, *Building and Construction Trades Council of Tampa (Tampa Sand and Material Co.),* 132 NLRB 1564, 1565-1566 (1961). Moreover, the Union was not required to actively discourage the sympathy strike in order to disestablish any connection to secondary activity, *Building and Construction Trades Council of Los Angeles (Kon Tee Bldg. Co.),* 162 NLRB 605, 608-609 (1967).

Before the picketing and sympathy walkout, the Union made no threats to force Respondent to stop doing business with the nonunion contractor Houchin Electric; and the Union business manager's comment after the sympathy strike began that there would have been no need for an informational picket, in reply to Respondent's question on what the Union position would be if there was no nonunion contractor, was hardly a

threat of economic reprisal to force cessation of business with another within the meaning of Section 8(b)(4)(ii)(B) of the Act.

Under the no-strike provision, Article XXII, of the collective bargaining contract with Respondent, quoted under heading B above, Respondent's manufacturing employees did not waive their right to engage in sympathy strikes. The right is not expressly prohibited by the language, and a prohibition may not be implied, because the contract restriction on strikes is tied to the procedure for the orderly settlement of grievances arising under the contract. Since neither the cause of, nor the issue underlying, the sympathy strike are subject to the settlement procedures of the contract, a ban on the sympathy strike may not be implied, *Buffalo Forge Co. v. United Steelworkers of America,* 428 U.S. 397, 407-408 (1976); *Montana-Dakota Utilities Co.,* 189 NLRB 879, 882-883 (1971), reversed on another ground, *Montana-Dakota Utilities Co. v. N.L.R.B.* 445 F.2d 1088 (C.A. 8, 1972).[4]

In both of the cited cases the employees who engaged in the sympathy strikes were under no-strike provisions of collective bargaining contracts similar to Article XXII of the contract in this case. It was held, by the Court in the *Buffalo Forge* case[5] and by the Board in the *Montana-Dakota case,* that such provisions do not imply a waiver by employees of the right to engage in sympathy strikes.

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[4] The other ground and resulting disagreement between the Circuit Court and the Board was the Court's view (contrary to the Board) that under a special picketing clause, separate from and in addition to the no-strike clause, of their contract, the utility employees had waived any right they might otherwise have had to cease work when confronted by a picket line. There is no such complication in the case at bar.

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[5] In *Buffalo Forge,* the issue arose on application for a District Court injunction against the strike, which was denied.

In *Buffalo Forge* the sympathy strike was by the production unit on behalf of the striking office workers unit of the common employer, when the office workers failed to obtain a collective bargaining agreement; the employees were represented by two locals of the same union, not unlike the situation here, where the Union local represents several autonomous divisions of workers.

The facts in *Montana-Dakota* were even closer to those of the case at bar. A group of the utility's unionized employees, who were assigned to work on a housing development project, refused to cross, or work behind, an informational picket, set up by a union other than their own, directed at a nonunion construction contractor. As in the case at bar, the utility employees were advised by their union steward that the picketing did not involve any issue or dispute with their employer and that each of them had to make his own decision as to whether he would cross the picket line.

It is useful to note, as was noted in *Montana-Dakota,* 189 NLRB at 882, that though employees (who have not waived their right) are engaged in protected concerted activity when they respect a picket line established by other employees, the employer of those engaged in the sympathy action is not without a balancing remedy. As set out in *Redwing Carriers*[6] and related cases, the protected right of the employees must be balanced against the specific business interest of the employer to conduct his business. Where the employer's business need to replace the employees clearly outweighs the employees' right to engage in protected activity, an invasion of the statutory right is justified and the employer may suspend or terminate such

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[6] *Redwing Carriers, Inc.*, 137 NLRB 1545 (1962), modifying 130 NLRB 1208, aff'd sub. nom. *Teamsters etc. Local No. 79 v. N.L.R.B.* 325 F.2d 1011 (C.A.D.C., 1963), cert. denied 377 U.S. 905.

unlawful in violation of Section 8(a)(1) and (3) of the Act.[8]

3. No Deferral to Arbitration

The Respondent has not asked for deference to the Arbitrator's award. Actually, Respondent opposes the award since the arbitrator commuted the discharges of Beekman and Edgar to sixty-day suspensions, and Respondent had not reinstated either employee at the time of trial. Respondent nevertheless has moved for deference to an alleged finding in the award that the two employees breached the collective bargaining contract by participating in the walkout. General Counsel and the Union have opposed such deference.

There is no sound basis for granting the motion. While I doubt that a party may pick and choose the part he likes from the part he doesn't like in asking Board deference to an arbitrator's award, there was no such finding in the award as Respondent alleges. The arbitrator, though he had the issues laid out for him, simply assumed that the sympathy walkout was illegal. He stated that all of the striking employees including Beekman and Edgar were equally at fault, and that while neither Beekman nor Edgar exerted affirmative leadership in causing the walkout, nevertheless Respondent had the right to discipline them, intimating that by reason of their union-related functions they owed some (undefined) special duty to prevent the walkout. The major concern of his conclusions was with the penalty of discharge invoked by Respondent. He held that the discharges were too severe a penalty and awarded instead a sixty-day suspension without pay for both employees, with

[8] The additional claim by Respondent that the two employees disobeyed a direct order to return to work as the walkout began was without substance. The "order" was the statement or request of Foreman Whitten addressed to all of the employees in general (and not to Beekman and Edgar in particular) saying, in effect, leave the plant if you are going to strike, else go back to work.

reinstatement to follow.

It is also obvious, therefore, that the arbitrator's award did not deal with the issues that required decision, *supra,* in dealing with the unfair labor practices alleged in the complaint; and that, to the extent that the arbitrator assumed or intimated views in those areas, such views appeared to be repugnant to Board Law.

For these reasons, and since the case at bar looks toward vindication of individual rights under the Act, deferral to the arbitration, or more exactly to a portion of it, is not appropriate. *General American Transportation Corp.,* 228 NLRB No. 102, 94 LRRM 1483, 1484-1486 (1977).

Conclusions of Law

1. The six-hour work stoppage on March 1, 1977, by Respondent's manufacturing employees, members of the Union's manufacturing division, in sympathy for informational picketing by construction employees who were members of the Union's construction division, directed at a nonunion electrical construction employer performing construction services for Respondent at the manufacturing plant, was a spontaneous sympathy strike by the manufacturing employees involved, and was not directed by the Union. The sympathy strike was not forbidden by the no-strike provision of the collective bargaining contract governing the unit of manufacturing employees, which provision was limited to a ban on strikes for grievances arising and arbitrable under the collective bargaining contract. Respondent's employees who participated in the sympathy strike were engaged in protected concerted activity under Section 7 of the Act.

2. Respondent's discharges of the two elected employee Union representatives of the manufacturing unit from among

the 85 employee participants in the sympathy strike, on the basis of their holding union office, were discriminatory against the two employees and constituted unfair labor practices in violation of Section 8(a)(3) and (1) of the Act. The discharges, on the further basis of an unproven accusation or mistaken belief that the two employees engaged in misconduct by providing the leadership for the walkout, infringed upon their right under Section 7 of the Act to engage in protected concerted activity, and constituted further unfair labor practices in violation of Section 8(a)(1).

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It will be recommended that the Respondent,

(1) cease and desist from its unfair labor practices;

(2) offer to reinstate employees Beekman and Edgar, and give each backpay from the effective date of their discharges, March 1, 1977, said backpay to be computed on a quarterly basis as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), approved in *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB No. 117 (1977);[9]

(3) post the notices provided for herein; and because the Respondent violated fundamental employee rights guaranteed by Section 7 of the Act, and because there appears from the manner of the commission of this conduct an attitude of opposition to the purposes of the Act and a proclivity to commit other unfair labor practices, it will be further recommended that the Respondent

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[9] See generally, *Isis Plumbing & Heating Co.*, 231 NLRB 716 (1962).

(4) cease and desist from in any manner infringing upon the rights guaranteed by Section 7 of the Act. *N.L.R.B. v. Entwistle Mfg. Co.,* 120 F.2d 532, 536 (C.A. 4, 1941); *P.R. Mallory and Co., v. N.L.R.B.,* 400 F.2d 956, 959-960 (C.A. 7, 1968), cert. denied 394 U.S. 918; *N.L.R.B. v. Bama Company,* 353 F.2d 323-324 (C.A. 5, 1965).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, there is hereby issued the following recommended:[10]

ORDER

Respondent, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or suspending employees or discriminating against them in regard to their hire, tenure, or any term or condition of employment, because of their protected concerted activities or because they hold union office in the bargaining unit when engaging in protected concerted activities.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make employees Virginia Beekman and Clifford

[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Edgar whole, in the manner set forth in the section of the decision entitled "The Remedy," for any loss of earnings incurred by each of them as a result of their discharges effective on March 1, 1977.

(b) Offer to both of said employees immediate and full reinstatement to their former jobs, or if the jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or other rights and privileges of each.

(c) Preserve, and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain the backpay due under the terms of this Order.

(d) Post in the plant at Tulsa, Oklahoma, copies of the attached notice marked "Appendix."[11] Immediately upon receipt of said notice, on forms to be provided by the Regional Director for Region 16 (Fort Worth, Texas), the Respondent shall cause the copies to be signed by one of its authorized representatives and posted, the posted copies to be maintained for a period of sixty consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 16, in writing, within twenty days from the date of this Order, what

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[11] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. May 31, 1978

S/S Herzel H. E. Plaine

Herzel H. E. Plaine
Administrative Law Judge

APPENDIX D

FMCS. 77K 11755
Discharge of Virginia Beekman
and Clifford Edgar

IN THE MATTER OF ARBITRATION
BEFORE WALTER L. GRAY, ARBITRATOR

THE INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL UNION 584

and

GOULD SWITCHGEAR DIVISION
(TERAC CONTROLS, INC.)

APPEARANCES

FOR THE COMPANY	Mr Richard Barnes, Attorney 124 East Fourth Street Tulsa, Oklahoma
FOR THE UNION	Mr. Thomas F. Birmingham, Attorney 416 Beacon Building Tulsa, Oklahoma

AWARD IN ARBITRATION

The above matter came on for hearing as per agreement of the parties at the office of the Union 584 South Lewis, Tulsa, Oklahoma at 9:30 a.m., May 17, 1977. The system Board was waived and it was agreed that the decision of the Neutral Arbitrator Walter L. Gray of Oklahoma City, Oklahoma would be the sole opinion. The hearing was completed the same day. A transcript was taken of the meeting by way of tapes as provided

by the company. A copy to be furnished to both the attorney for the union and to the arbitrator. It was agreed that the transcript and the briefs would be in the mail to the arbitrator by June 17, 1977 and by agreement this was later extended to June 24th. From the transcript of the proceedings and the briefs as filed by the attorney for the Company and the Union this award is written.

STATEMENT OF FACTS

The grievants were employees of the Gould Switchgear Division (Terac Controls, Inc.) of Tulsa, Oklahoma. This company is a manufacturer of electrical assemblies and employs about 125 or more. The company works two shifts. The day shift begins at 7:30 and ends at 4 p.m. We are concerned in this case with just the first shift.

On March 1 a short time after the employees went to work they saw a picket walking in front of the plant. This caused quite a bit of confusion among the workers until it was learned that the picket was from a different unit of this union, but was there as an informational picket. A union electrical contractor had been making repairs at the plant for about 6 months and it was learned that the Stewart Company was to be replaced by the Houchin Electric Company, a nonunion electric company. Then the question came up with the workers what to do in a like situation as to staying on the job. There developed an idea among the employees to have a meeting and to inquire more about the situation. It was decided to have this meeting in the lunch room of the company at the 10 o'clock break.

The grievant, Virginia Beekman, was the duly elected shop steward for the manufacturing unit and the grievant Clifford Edgar was Chairman of the Bargaining Unit. Mrs. Beekman had been with the company for six and a half years. Mr. Edgar

had also been an employee for some years. Both were at work on March 1, 1977 at the plant of the company.

Shortly before the 10 o'clock break Mrs. Beekman obtained permission from her superior to use the telephone and called Mr. Clinton Shroufe, Business Agent of the union, and asked his advice as what to do. It appears that she was told this was a dispute aimed at Houchin Electric Company, and that the picket was an informational picket as Houchin Electric Company had no contract with Local 584.

At the meeting in the lunch room there was a great deal of discussion about what to do. The company and the union are miles apart as to who was in charge of the meeting. It appears to this arbitrator that it was a rump session with just about everyone having his say. It does appear however that it was decided to take some definite action, and the question at the 10 o'clock meeting was *when*. It seems that it was voted at this session that the workers would wait until after quitting time at 4 p.m. and then make a positive action in connection with the problem at hand. The company insists a vote was taken at 10:00 to strike immediately.

However, a number of witnesses testified at the hearing that there was a second meeting at the bottom of the stairs before the employees went back to work. That it was then voted to go on strike immediately and this vote carried. It is admitted that Mrs. Beekman did not attend this second meeting as she was on the phone with Mr. Shroufe, but the company contends that she answered questions and was very much at the first meeting at 10 o'clock. The company contends that she was a leader, if not in fact, that leader at this 10 o'clock meeting. The union contends that while she was present that she did not at any time advise a strike but said that each man should take his own position as to what to do.

There is no question as to what happened then. After the vote was taken to walk out, Mr. Whitten a company foreman in the plant mounted the steps and told all those who had voted to strike and clocked out that they should leave the plant and that those who had not clocked out to immediately return to their stations.

The result was that all of the employees left the plant at once. However, the union contends that Beekman and Edgar were the last to leave the plant.

That afternoon the company sent a telegram to all employees telling them to report to work the next day and if they did not they would be subject to discharge.

On the morning of March 2 Virginia Beekman and Clifford Edgar reported to work. They were told by the foreman not to clock in and were taken to the personnel director, Mr. Lewis Ellis. They were told by Mr. Ellis that they had violated Section XXII of the Contract between the company and the union. They were told that they would be suspended without pay. A number of witnesses were then interviewed by Mr. Ellis and on March 10, 1977 both Mrs. Beekman and Mr. Edgar received identical letters of discarge as of March 1, 1977.

It is as a result of these letters of discharge that the grievance before us was filed by Mrs. Beekman and Mr. Edgar. The union asks that the arbitrator order their reinstatement with full pay, and all seniority as of March 1, 1977. The company asks that the grievance of these two parties be denied in full.

COMPANY POSITION

The Issue

The issue as agreed to: "Did the Company violate the collective bargaining agreement by discharging Virginia M.

Beekman and Clifford E. Edgar? If so, what is the remedy?"

Article XVI
Discipline and Discharge

a. The Company has the right to discipline employees and to effect discharges for cause *without prior warning*. However, the Company will not discharge or demote any employee because of unsatisfactory work without warning and affording a chance to bring work performance to a level comparable with that of other employees in the same classification.

An employee who is given such warning will be told that a written memorandum of the warning has been placed in the employee's personnel file and the employee and the Shop Steward will be given a copy of the memorandum.

Any employee who requests it will be permitted to have the Shop Steward present during a reprimand.

Power of Arbitrator

The arbitrators will have power only to interpret the provisions of this Agreement that are in dispute, and will have no power to add to, subtract from, alter, modify or disregard any of the terms of this Agreement or amendments or supplements hereto.

An arbitration decision or award will be based only on the specific provisions of this Agreement.

Article XXII
Strikes and Lockouts

In view of the procedure for the orderly settlement of grievances provided under the terms of this Agreement, the Union agrees that there will be no strike, work interference, or other stoppage or slowdown of work, total or partial, during the

employees so that he can immediately or within a short period thereafter replace them with others willing to perform the scheduled work.

Here, Respondent's employees engaged in a sympathy walkout and refusal to work behind or cross an informational picket line. The informational picketing was legitimate under Section 8(b)(7)(C). The picketing was directed at nonunion electrical construction contractor Houchin Electric, informing the public, on behalf of the construction members of the Union, that Houchin had no collective bargaining agreement with the Union. There was no evidence that the six-hour sympathy work stoppage of Respondent's manufacturing employees had any effect on Houchin Electric, let alone the substantial disruptive effect the Board would require to be shown when the legitimacy of an informational picketing is challenged under the "effect" clause of Section 8(b)(7)(C), *Retail Clerks Union Local 324 et. al. (Barker Bros., Corp. and Gold's Inc.),* 138 NLRB 478, 490-491 (1962).[7]

The six-hour work stoppage by Respondent's employee's was therefore protected concerted activity under Section 7 of the Act, and discharges founded upon participating therein were in violation of Section 8(a)(1) of the Act.[7a]

Respondent made no claim of justifying the discharges of employees Beekman and Edgar under a balancing of the employer's business needs against the employees' rights (to engage in the protected activity) under the *Redwing Carriers* doctrine discussed above. On the contrary as discussed below, the

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[7] Indeed, Respondent provided no evidence in support of its claim of statutory violations by the Union beyond the assertions thereof that were apparently the same assertions before the Regional Director when he refused to issue complaints against the Union on charges filed by Respondent, see heading D above.

Respondent selected the two employees for discharge not for any economic reason but for allegedly violating a claimed special duty owed by these two employees as elected union representatives of the unit of employees.

2. Discrimination Against the Employee Union Representatives

Respondent requested each of the striking employees to return to work by the start of the next regular shift, or risk discharge. All of the employees complied with the request and were put back to work without penalty or talk of penalty, except the two elected employees union representatives, Shop Steward Beekman and Unit Chairman Edgar. These two employees were first suspended and later discharged.

Out of the 85 strikers, Respondent selected these two employees for discipline because, in Respondent's view, by virtue of their status as elected shop steward and unit chairman, respectively, they supposedly had a special responsibility and higher duty than the other employees to take steps to prevent rather than participate in the work stoppage.

Discharge for this reason was discriminatory under Section 8(a)(3) of the Act, and has been held so even where the walkout was unprotected activity. In *Precision Castings Co.*, 233 NLRB No. 35, slip op. p. 4, 96 LRRM 1540, 1542 (1977), where the employer disciplined only the union stewards following an unauthorized walkout under the governing collective bargaining

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[7a] Even if the walkout of the first day by Respondent's employees were not regarded as protected activity at its inception, Respondent condoned the concerted activity by its demonstrated willingness to forgive the unprotected aspect of it in offering to accept, and accepting, the return of the employees without discipline at the start of the shift on the second day, *Super Valu Xenia*, 228 NLRB No. 156, slip op. p. 12 (1977); *Confectionery and Tobacco Drivers v. N.L.R.B.*, 312 F.2d 108, 113-114 (C.A. 2, 1963), enforcing *M. Eskin and Son*, 135 NLRB 666; *Brantly Helicopter Corp.*, 135 NLRB 1412, 1413, 1417-1418 (1962).

contract, the Board held that selecting for discipline the employees who held the position of shop steward, assertedly because they could be held to a greater degree of accountability for participating in the strike, was discrimination directed against an employee on the basis of his or her holding union office contrary to the meaning of Section 8(a)(3) of the Act. The discipline was held to violate Section 8(a)(3) and (1) of the Act.

Respondent went a step further and accused employees Beekman and Edgar not merely of participation but of leadership in the walkout. However, the proof adduced at trial did not sustain the accusation. Rather it appeared that the employees assembled spontaneously in unorganized fashion on their morning break and discussed walkout to avoid working behind and crossing the picket line. Beekman made clear to the employees that they were acting individually, and Edgar asked them to delay any walkout until the end of the day to allow time for discussion between Respondent and the Union and avoidance of a walkout. His request was initially agreed to, but was subsequently overridden by successive votes of the employees, and Beekman and Edgar followed the rest of the employees in walking out of the plant.

Assuming that proven leadership by the two elected employee representatives in connection with the sympathy walkout might have been regarded as misconduct justifying employer discipline including discharge, the discharges of these two employees (who had participated in the protected concerted activity) based on unfounded accusations or mistaken belief that they engaged in strike leadership or misconduct, constituted acts of interference, restraint, or coercion infringing rights under Section 7 of the Act in violation of Section 8(a)(1), *N.L.R.B. v. Burnup and Sims, Inc.*, 379 U.S. 21, 23 (1964).

The discharges of employees Beekman and Edgar were

structions of Foreman Whitten to return to work when they had failed to do so at the end of their scheduled break (Tr. 49, 208). Each admitted total disregard of that instruction in violation of Rule 7 of the posted Company Rules (TR. 49-50, 208). Each also admitted the failure to get permission to leave the plant as required by Rule 8 of the posted Company Rules (TR 49-50, 209). No contention was made by the Union that these Grievants were unaware of the posted Company Rules. The Rules had been posted continuously from their inception (Tr. 52, 53). In fact, Grievant Beekman participated in an arbitration case arising under both of these Rules (Company Exhibit No. 3).

The Company has consistently applied summary discharge to violations of posted Rules 7 and 8 (Tr. 99-103). See also Company's Exhibits No. 3 and 4.

The Union may contend that the walkout would not have occurred but for Whitten's instructions. Grievants Edgars' testimony shows that the decision to walkout had been made prior to Whitten's appearance at the meeting (Tr. 208). And none of the employees had walked out prior to Whitten's instructions (Tr. 139-140, 214, 221-222, 230).

Conclusion

The Collective Bargaining Agreement and the body of arbitral law dictates that the grievances be denied.

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[2] Union Exhibit No. 5 concerns denial of issuance of Complaint by the NLRB on the initial secondary boycott charge filed by the Company. That denial is on appeal because of the mandate in I.B.E.W. Local Union 502 v. N.L.R.B., 341 U.S. 694 (1951). Two other charges have been filed which have not yet been determined. Strikes with illegal objectives are unprotected under the National Labor Relations Act. N.L.R.B. v. Sands Manufacturing Co., 306 U.S. 332 (1939); H. M. Newman, 85 NLRB 725 (1949); Thompson Products, Inc., 72 NLRB 886 (1947).

UNION POSITION

The union contends the evidence does not support the accusation that Beekman and Edgar led a plant-wide work stoppage. Further the union contends the grievants' conduct does not violate Article XXII of the contract which says:

> In view of the procedure for the orderly settlement of *grievances provided under the terms of this agreement,* the union agrees that there will be no strike, work interference, or other stoppage or slow down of work, total or partial, during the term of this agreement. (Emphasis Supplied)

The March 1 incident was not brought about in any way by any grievance between the employees of Gould and the employer. There was no issue of a contract violation for which a grievance could be filed. There was a legal informational picket informing the public the employer had a contractor in the plant which did not have an agreement with the construction unit of the I.B.E.W.

Since Article XXII prohibits strikes or work stoppages, based upon issues arising out of contract disputes, there was no violation of Article XXII.

The union contends the company was responsible for the walkout when it failed in its duty to fully inform the employees of the consequences of a walkout and the failure of the company to effectively order the employees back to work.

The union contends the grievants were the only two union officials in the unit, and they were dismissed because of their position as union officials, not because of their participation in leaving the plant. The conduct of the grievants, Beekman and Edgar, was no different than the conduct of the other 93 some employees who left the plant on March 1st. Therefore, the

dismissal of Edgar and Beekman is an arbitrary and discriminatory application of discipline. Both grievants had a long work record without a blemish, and dismissal is too severe a penalty for their conduct of March 1, 1977.

Proposition I

The grievants were terminated for leading a plant wide work stoppage when in fact the evidence does not indicate they led such a plant wide work stoppage.

Under the contract (Joint Exhibit 1), an employee cannot be discharged except for cause, Article XXVI.

Both grievants, Beekman and Edgar, received the identical letter of discharge, (Company Exhibit 5).

The termination of these two employees is bottomed in the paragraph of that exhibit which states:

> Most seriously, however, the evidence shows that you were one of the leaders of a plant-wide employee work stoppage on March 1, 1977, in violation of Article XXII of our collective bargaining agreement. You have offered us no acceptable excuse for your conduct, Company Exhibit 5

The union contends there is no evidence which shows Virginia Beekman and Clifford Edgar were "one of the leaders of a plant-wide work stoppage."

Of the 16 witnesses called or stipulated to in the arbitration, including the company witnesses, not one ever stated the grievants:

(1) Called either the lunchroom meeting or the bottom of the stairs meeting on March 1.

(2) At either meeting told any employee that he or she should leave the plant before the regular shift ended.

(3) Encouraged, led or suggested to any employee they participate in a work stoppage.

The walkout was in fact triggered by a statement made by company foreman, Grover Whitten, who told the employees at the meeting at the bottom of the stairs that those who had clocked out were to go home and the others back to work.

It was at that point that the bulk of the employees walked out of the building. At this stage Mrs. Beekman was 20 feet away under the stairs and out of sight, talking on a telephone to the local union hall to report what had transpired at the lunchroom meeting.

Of all the witnesses listed by Mr. Ellis in his "investigation," not one of these witnesses testified at the arbitration hearing to the effect that Mr. Edgar or Mrs. Beekman led, participated in or encouraged a walkout of the Gould Company employees.

It is the union's position that the grievants, Beekman and Edgar, could not have led the walkout as charged in the termination letter above stated.

Proposition II

The Company failed to fully inform the employees of the consequences or discipline to be taken concerning the incident of March 1st.

The record is unequivocal that no company supervisor at any time, even though they were aware employee meetings were taking place, ever gave the employees a direct order to go back to work or suffer termination.

The top people in charge of personnel at the plant, along with the foreman, took no affirmative steps to advise the employees to go to work, took no affirmative steps to advise the employees that a walkout would precipitate their discharge and

in fact encouraged the employees to leave the plant by the statements that if you clocked out to go home, or that go home because we don't want you to get in trouble with the union. These statements were not the type which should have been given to a confused group of employees wondering what action to take.

Therefore it was the company, not the shop steward or the unit president, which in fact encouraged the employees to leave the plant on March 1, 1977. The plant superintendent passed within 5 feet of the group gathered at the bottom of the stairs where the critical decision on whether to stay or leave was being made. He could see a meeting was in progress during working time. All it would have taken to get the group back to work was for the superintendent to address the group and inform them that they had to go back to work and that leaving the premises would be a violation of a company rule.

Proposition III

The company's decision to terminate the grievants was not "for cause," but represented an arbitrary and discriminant application of punishment.

The evidence shows the entire 95 person work force that appeared at the assigned time of 7:00 a.m. on March 1, 1977 did leave the plant shortly after the scheduled 10:00 a.m. coffee break. All those who left reported the next day for work at the assigned time. Only two of the 95 were singled out for any type of discipline, the two being the grievants, Beekman and Edgar.

The company during the hearing shifted its position from the termination letter, which alleged Beekman and Edgar "led a walkout," to an accusation of negative leadership by the steward and unit president.

The transcript also indicates that company officials, name-

ly personnel director Ellis, plant superintendent Bellis and foreman Whitten all had an opportunity to direct the work force to stay in the plant but they did not do so. All had opportunities to directly order the work force back to their stations. However, no plant official ever issued such an order.

Conclusion

The union contends the record, when read as a whole, does not support the accusation that the grievants "were one of the leaders of a plant-wide employee work stoppage on March 1, 1977," that the employees did not have a "leader or leaders" during the incident, but merely exhibited a confused reaction to an informational picket being at the company on the date in question. That the company itself was at fault and precipitated the incident by having a foreman mount the stairs and address a group of confused employees, telling them "those that had clocked out could go home and those that hadn't could go back to work."

Both the personnel director and the plant superintendent had abundant opportunities to address the employees and order them back to work or at a minimum, contact the grievants and ask them to order the employees back to work. The evidence is clear that management failed to perform either of these duties.

Finally, while admitting that the grievants did leave the plant on March 1, 1977, they were but two of 95 employees which also left the plant and none of the other employees received any disciplinary action. That the grievants were discharged because they were union officers, with the intent of the company to discriminate against their union position. Furthermore, termination under the facts and the cases cited creates not only an arbitrary selection of discipline, but is also too severe a penalty for the conduct displayed.

Therefore, the union respectfully requests that the arbitrator order the grievants, Virginia Beekman and Clifford Edgar, reinstated with full back pay and full seniority to their positions held on March 1, 1977 at Gould, Inc., Switchgear Division, formerly Terac.

CONCLUSIONS OF ARBITRATOR

In this case we had a hearing that lasted from 9:30 a.m. until 2:00 p.m. with no interruptions. This arbitrator wants to thank both management and labor for such splendid cooperation. The transcript taken at the hearing consisted of 238 pages all of which was read at least twice by the arbitrator to be sure that he did not miss any important testimony.

Let me say in the very beginning that the actions of March 1, 1977 at the plant was an emotional blow up and certainly nothing that anyone could look upon with pride and satisfaction. I am sure that all parties involved, now that it is over, would use more discretion should such a situation arise again. Walking off a job must be considered to be a *very serious matter*. It must be admitted that interruption of work is destructive of the industrial discipline on which our complex industrial society rests. It is necessary to make this premise before proceeding with the body of the arbitrator's award.

Discharge is recognized to be the extreme industrial penalty since the employee's job, his or her seniority, and accrued benefits are involved. It is one of the most frequent cases to be heard by an arbitrator unfortunately. All elements involved in discharge cases must be considered with the greatest of care and caution.

Certainly no arbitrator can dispel his own band of justice. He is bound by certain limits. One of the first things that must be considered is that in most agreements, as in the case at hand

are these words:

> "The arbitrator will have power only to interpret the provisions of this agreement that are *in dispute,* and will have no power to add to, subtract from, alter, modify, or disregard any of the terms of this Agreement or amendments or supplements thereto."

Some would interpret this *so literally* that there would be no need for arbitration. That was never meant by making such a provision in labor agreements.

Now let us go immediately to what might be the thrust of this whole case. Are the terms of the agreement such that this arbitrator cannot in any way consider *discipline* in its broad sense or is he bound to so *literally follow the agreement that he has no choice but to uphold the discharge of these two employees?* It is after a great deal of research of other awards and court decisions that we must remember that in Article XXII we find these words, ***"may be disciplined or discharged."*** If we must uphold the discharge as the only thing this arbitrator can do, we might as well end the award here. But we are convinced that we can very well consider the words ***"may be disciplined or."*** Feeling firmly that this arbitrator has this right to go into the matter in depth it is the desire of this award to do so.

First, let us see what really happened on March 1. A lone picket appeared in front of the plant. There was considerable alarm among the employees. No one blames the employees for being concerned. That is their right. However, instead of asking Virginia Beekman and/or Clifford Edgar to go to management and ask what this picket was doing out there after all it was decided to have a meeting to take action. Certainly Mrs. Beekman and Mr. Edgar did not show any great measure of leadership in not making an effort to find out from the company what the facts were and then to call their business agent,

Mr. Shroufe, for his advice. This was a breakdown in labor relations as it should be. This arbitrator must be fair in stating that he feels that all 80 or 90 workers that day were *equally at fault*. But Mrs. Beekman and Mr. Edgar had a duty to perform and there is a great deal of confusion as to what really did happen on their part. Certainly there was a meeting at 10:00 a.m. and it is agreed Mrs. Beekman and Mr. Edgar were there and voted to walk out.

We now come to the big question that must have real significance. Did either of them call this meeting or was it a hastily called gathering and not in fact a called meeting of a union? We must find it was not a meeting called by either officer as such.

While there is some confusion as to the result of that first meeting at 10:00 a.m., this arbitrator feels that a vote was taken and carried to wait until after 4:00 o'clock and have a meeting to properly consider the matter of a walkout. In just a very few minutes this vote was overturned by a voice vote at the bottom of the stairs and it was decided to *walk out at once*. This was no decision that would warrant a blue ribbon for performance and we feel most labor members now agree. It is agreed by both parties Mrs. Beekman was not at this meeting at the bottom of the stairs but was on the telephone talking to Mr. Shroufe, Business Manager, but Mr. Edgar was present.

What happened next is not clear to this arbitrator. The union says that Foreman Whitten approached the group and told them that those *who had clocked out* to leave the premises. The company says it was not a demand, it was a request. But one thing is agreed upon, they all left the plant including Mrs. Beekman and Mr. Edgar whom the union says were the last to leave. Here the question must come up is whether the Foreman had used a little more diplomacy in his approach might this not

have kept a mass exodus from taking place? Neither side agrees to my theory.

We skip the details that followed. All parties did report next day and Mrs. Beekman and Mr. Edgar were notified that they had been suspended without pay pending further investigations. We are convinced that Mr. Ellis is a splendid, upright man, and that he did make an investigation which resulted in the discharge of the two grievants. The Courts have held that in the case of an illegal strike that an employer is not required to deprive itself of the services of all its employees. This would be industrial and financial suicide both for the company and for the families of the employees. Therefore, we do not blame Mr. Ellis for taking disciplinary action against Mrs. Beekman and Mr. Edgar but we do reserve the right to discuss the severity of such action.

There are several questions that need to be asked and answered.

1. Did the company have the right to discipline Virginia Beekman and Clifford Edgar, and did the agreement existing between management and labor give the company that right?
The answer must be **yes without a question.**

2. Did management and labor miss the opportunity to sit down and discuss the picket and why he was there in the first place. Might this have avoided the walkout?
The answer again is **yes** and both parties should know that by now.

3. Was there a good working arrangement between the union and this company.
Answer. **Yes** there was every evidence of it on the surface, at least.

4. Was it a mistake to punish two people when all were

equally to blame in the walkout? Answer. **No.** It would have been wrong and financially a loss to have disciplined all the people involved.

5. Is there any evidence that Mrs. Beekman and Mr. Edgar had been disciplined before?
Answer is **no.**

6. Did Mr. Clifford and Mrs. Beekman show a lack of leadership in this instance.
Answer. We must say they did, and we feel it was due from lack of experience however.

7. Was Mrs. Beekman in the meeting at the bottom of the stairs and did she vote for an immediate walkout?
The answer is **no.** She was on the phone talking to Mr. Clinton Shroufe, but she did not walk out.

8. Did Mr. Edgar take the lead in forcing a strike or was he more or less negative.
Answer. The only answer that this arbitrator has is that Mr. Edgar was there at all times and must share the blame regardless of his negative leadership.

9. Was discharge too severe in this case or would suspension have been more in order?
The answer is **yes. Discharge was too severe** and we shall dwell on reasons in the lines that follow.

In support of my decision to hold that discharge was not the proper thing to do may I cite the following awards and decisions to sustain my position.

Brush Pottery Co., and International Brotherhood of Pottery Workers
CCH Labor Arbitration Awards #8120 76-1 ARB
Protective Treatments Inc. and United Automobile etc.
#8593 73-2ARB

term of this Agreement.

An employee or employees who participate in any such action in violation of this Agreement may be disciplined or discharged from the Company's service, subject to the employee's right to submit a grievance alleging improper discharge in accordance with the provisions of Article XX, Section 3, paragraph (c) of this Agreement.

The Union agrees that it will take immediate, positive action to forestall or suppress any action on the part of employees in violation of this Agreement.

The Company will not lock out any employee or employees while this Agreement is in force.

Article XXIII
Management Rights

All management rights and functions not expressly and

* * *

7 . Insubordination, including (a) refusal to perform work assigned, except refusal to do any acts which would subject him to discharge under any of the other offenses herein listed; (b) failure to perform work assigned; or (c) malicious use of profane or abusive language toward fellow employees or toward those in supervisory positions.

8 . Absence from duty without notice to and permission from his immediate supervisor.

* * *

Failure of union leadership to act effectively to prevent an illegal walkout will, alone, justify discipline. *Herrud Co.*, 66 LA 682 (Keefe, 1976); *Seabright Co., Inc.*, 53 LA 154 (Belcher, 1969); *Stockham Pipe Fittings Co.*, 4 LA 744 (W. McCoy, 1046); *Bethlehem Steel Co.*, 2 LA 194 (Shipman, 1945).

two prior arbitrators (Company Exhibit No. 3 and Company Exhibit No. 4).

Those courts have dealt with the issue, have universally held that the arbitrator has no power to reduce the penalty where the contract grants to the employer the option to discharge participants in wildcat strikes.

> "The reservation of a right to either discipline or discharge for cause, would be wholly ineffective and meaningless if the employer's action, pursuant to such right, is subject to review by an arbitrator on the basis of appropriateness. If the reserved right is construed to mean that the employer can take no disciplinary action in excess of a reprimand, except at its own risk and subject to severe penalties in case the arbitrator should later be of the opinion that some milder action is appropriate, the effect would be that the employer's inherent right which has not been expressly relinquished by contract is not right at all."

CCH Reports
U.S. Steel Corp. 49LA 1236
Mississippi Lime Co. 29L.A. 559
Southern Bell Tel. Co. and Telegraph Co. 25 L.A. 85
Valley Steel Casting Co. 22 L.A. 520
United Air Lines Inc., 19 L.A. 585 McInerney Spring and Wire Co. 21 L.A. 80
Gulf States Tel. Co. vs. Local 1692 416 F 2nd 198
Arbitrator Kesselman in 54 L.A. 145
Gerber Products Co. 46 L.A. 956
Teleddyne Isotopes and United Plant Guard etc. CCH Labor Reports 76-1 #8119
Morris Bean vs. U.S. Steel Workers CH Reports 74-1ARB #8068
Powermatic vs. Houdaillie 65 L.A. 1245
Bendix Corp. vs. Laborers District Council etc. 61 L.A. 149
Hoosier Panel Co. Inc. vs. International Pottery etc. 61 L.A. 981 47 L.A. 890 -25 L.A. 90 L.A. or 25 L.A. 85-87

We feel that the Amanda Bent Bolt vs. UAW 1594 so often cited does not apply in this case since we have the added word *discipline* to deal with, and, therefore this arbitrator is not dispensing *his band* [sic] *of justice* but is following the law.

Both Mr. Ellis and Mr. Shroufe had a hard matter to settle. Mr. Ellis must see that order is maintained in his plant and he is to be commended for so doing. Mr. Stroufe certainly did not order a walkout and could not be the movant in the walkout, but did the best he could for his union. Where then is the blame for this incident? We feel that better labor relations could and should exist between this company and this union, and that every effort should be made to prevent anything like this taking place again. This is not an order as I have no right to make such

an order but I feel deeply this strike could have been averted.

Elkouri and Elkouri in their 1973 edition *How Arbitration Works* sets forth reasons why discharge is in many instances may be too severe a penalty for the offense under the circumstances of the case—page 613. We feel that this is exactly the case here.

Not to be too verbose in this award this arbitrator feels that a suspension of 60 days for both Mrs. Beekman and Mrs. Edgar would be sufficient punishment and it is so ordered. This would be no pay from March 1 to May 1, but payment thereafter at the salary paid at the time of the walkout, or on March 1, 1977. We feel a penalty of discharge is *too severe* in a case involving facts such as were present in this case, but discipline for 60 days is entirely justified.

Award

The arbitrator makes the following award in connection with the parties in this case.

1. He finds that both Virginia Beekman and Clifford Edgar were in fact guilty of insubordination on March 1, 1977 in walking out of the plant as they did and under the circumstances involving an illegal walkout.

2. This arbitrator finds that the actions of walking out on March 1 at the plant of the company was an illegal act and it is to be regretted that only two people must pay the penalty for their combined efforts.

3. This arbitrator feels that there should have been some action on the part of labor and/or management to have had a joint meeting and not let this matter get out of hand as it did. Both must accept some blame for the final results. *It could have been avoided.*

4. While the employees Virginia Beekman and Clifford Edgar did violate the agreement and the posted rules 7 and 8 of the company yet a discharge of the 2 parties was *too severe.* It is thereby ordered that Virginia Beekman and Clifford Edgar be and they are suspended for a period of 60 days from March 1 to May 1, 1977 and without pay. Pay for both shall begin on May 1 when they shall be considered to have returned to their positions at the same rate of pay when action was taken against them. Each Grievant reinstated shall have full rights of seniority and fringe benefits unaffected by the discharge but consistent with other provisions of the Agreement respecting period of disciplinary suspensions.

This award is dated July 8, 1977 at Oklahoma City, Oklahoma.

S/S Walter L. Gray
Walter L. Gray,
Arbitrator

No. 80-1589

FILE
MAY 22 19
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

BROWN BOVERI ELECTRIC, INC., SWITCHGEAR SYSTEMS DIVISION (FORMERLY GOULD, INC., SWITCHGEAR DIVISION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board correctly concluded that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging two employees because they participated in a sympathy walkout.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is not yet reported. The decision and order of the National Labor Relations Board (Pet. App. C1-C3) is reported at 238 N.L.R.B. 618.

JURISDICTION

The judgment of the court of appeals (Pet. App. A15-A16) was entered on November 7, 1980. A petition for rehearing was denied on December 18, 1980 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on March 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at pages 2-4 of the petition. In addition, Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a), provides in pertinent part:

> The Board is empowered * * * to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

STATEMENT

1. Petitioner's manufacturing employees are represented by the International Brotherhood of Electrical Workers, Local Union 584 ("the Union").[1] The Union's construction division established an informational picket line at petitioner's premises in furtherance of its campaign to organize the employees of electrical construction contractors (Pet. App. C9, C15). The picketing was directed at Houchin Electric Co., a nonunion electrical contractor that was working on a plant expansion job at petitioner's plant (*id.* at C9). The picket sign was entitled "Information," and it notified readers that Houchin Electric Company did not have an agreement with the Union (*ibid.*).

The shop steward of the manufacturing employees, upon learning of the picket line, called the Union business agent to inquire about it. She was told that the picketing was directed at Houchin, was purely informational, and was not related to any violation by petitioner of the collective bargaining contract covering the plant employees. The Union

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[1]The Union has three divisions: manufacturing, construction and maintenance (Pet. App. C8). Petitioner's employees were represented by the manufacturing division.

agent added that it was up to each employee to decide what to do since the Union would not advise the employees (Pet. App. C10-C11). The shop steward and the unit chairman conveyed this information to the first shift employees, and shortly thereafter most of them walked out (*id.* at C11-C12). The Union business agent, upon learning that the employees had left the plant, informed the second shift workers that the picketing had no relation to the employees' collective bargaining contract, and that they should proceed to work, which they did (*id.* at C16).

The following day all the first shift employees were put back to work except for the shop steward and unit chairman, who were discharged for participating in the sympathy walkout (Pet. App. C17-C18). The Union filed grievances on behalf of the two discharged employees.[2] The arbitrator to whom the grievances were referred assumed without explanation that the walkout was a violation of the

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[2]The collective bargaining agreement between the Union and petitioner provided (Pet. App. C10):

> In view of the procedure for the orderly settlement of grievances provided under the terms of this Agreement, the Union agrees that there will be no strike, work interference, or other stoppage or slowdown of work, total or partial, during the term of this Agreement.
>
> An employee or employees who participate in any such action in violation of this Agreement may be disciplined or discharged * * *.

The contract contained a grievance procedure leading to arbitration. To be arbitrable, a grievance had to allege misapplication or violation of a specific provision of the agreement and was limited to subject matter expressly contained in the agreement (*id.* at C9).

collective bargaining contract, but, finding that the discipline was too severe, reduced the discharges to suspensions.[3] Petitioner did not comply with the award, contending that the arbitrator had no authority to modify the penalty (Pet. App. C18).

2. The Union also filed unfair labor practice charges with the Board. The Board, affirming the rulings and findings of the administrative law judge (Pet. App. C4-C30), concluded that the sympathy walkout was activity protected by Section 7 of the Act, 29 U.S.C. 157, and therefore that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by discharging the shop steward and unit chairman for participating in the walkout (*id.* at C1-C3; see also C19-C22).

The Board rejected petitioner's contention that the walkout was not protected because the picketing was violative of Sections 8(b)(4)(ii)(B) and 8(b)(7)(C) of the Act, 29 U.S.C. 158(b)(4)(ii)(B) and 158(b)(7)(C). The Board found that the Union's statement that petitioner's employees should make their own decision regarding the informational picket line did not constitute inducement within the meaning of subparagraph (i) of Section 8(b)(4), and that the Union did not threaten petitioner with economic reprisal within the meaning of subparagraph (ii) of that Section. The Board further found that the work stoppage did not have the disruptive effect necessary to render the otherwise lawful informational picketing violative of Section 8(b)(7)(C) (Pet. App. C19-C20, C22).

The Board rejected petitioner's further contention that the no-strike clause of the collective bargaining agreement waived the employees' right to engage in sympathy strikes. The Board stated (Pet. App. C20):

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[3]The arbitrator's decision is set out at Pet. App. D1-D22.

> The right is not expressly prohibited by the language, and a prohibition may not be implied, because the contract restriction on strikes is tied to the procedure for the orderly settlement of grievances arising under the contract. Since neither the cause of, nor the issue underlying, the sympathy strike are subject to the settlement procedures of the contract, a ban on the sympathy strike may not be implied, *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397, 407-408 (1976).

Finally, the Board refused to defer to the arbitrator's award, concluding that the award did not meet the standards for deferral established in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) (Pet. App. C2 n.2).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A1-A14). The court agreed with the Board that petitioner's employees' refusal to cross their fellow union members' picket line constituted concerted activity for "mutual aid and protection" that was safeguarded by Section 7 of the Act (*id.* at A5-A7). The court also agreed with the Board that the Union did not waive the statutory right to engage in sympathy strikes by agreeing to the no-strike clause since there was no " 'clear and unmistakable' " contract language, nor extrinsic evidence, demonstrating an intent to waive that right (*id.* at A7-A8). The court further explained (*id.* at A8-A9):

> [A] no-strike obligation is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration. *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970). Accordingly, "[a]bsent an explicit expression of [another] intention . . . the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." *Gateway Coal Co.* v. *UMW*, 414 U.S. 368, 382 (1974).

Finally, the court found no abuse of discretion in the Board's refusal to defer to the arbitration award because the award "clearly ignore[d] a long line of Board and court precedent" (Pet. App. A14).

ARGUMENT

1. Petitioner contends (Pet. 8-10) that, because "[t]he striking employees sought nothing for themselves or for any other employees of any employer" (Pet. 8), their activity was not protected activity. This contention is without merit. The action taken by petitioner's employees clearly was in support of the concerns of their fellow unionists in the Union's construction division. Such action constitutes "mutual aid or protection" in the most literal sense. See *NLRB* v. *Union Carbide Corp.*, 440 F. 2d 54, 55-56 (4th Cir.), cert. denied, 404 U.S. 826 (1971). Petitioner's reliance on *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978), is misplaced. The Court there recognized that Section 7 protects the right of employees to "support * * * employees of employers other than their own" (437 U.S. at 564), and cited sympathy strikes as recognized examples of such protected activity (*id.* at 564-565 n.13).[4] See also *Houston Insulation Contractors Ass'n* v. *NLRB*, 386 U.S. 664, 668-669 (1967).[5]

2. Petitioner's contention (Pet. 11-12) that the sympathy strike was prohibited by the no-strike clause rests on an

---

[4] *Reed* v. *NLRB*, 430 F. 2d 331 (10th Cir. 1970), is inapposite. That case did not involve a sympathy strike, but rather a practice of refusing to work on particular days because of bad weather.

[5] The court of appeals correctly noted that the employees' right to refuse to cross a lawful picket line at their employer's place of business is not unlimited. While the employer cannot discharge an employee for such activity, an employer may hire permanent replacements when justified by substantial and legitimate business justifications. Petitioner does not contend that it discharged the two employees because it had replaced them (Pet. App. A8 n.3).

erroneous reading of *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976). Contrary to petitioner's suggestion (Pet. 12), the Court there did not hold that sympathy strikes are traditionally precluded by a broad no-strike arbitration provision. Rather, the Court refused to enjoin a sympathy walkout, stating that "[t]o the extent that * * * courts * * * have assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, they are wrong." 428 U.S. at 408 n.10. The Court explained that the "*quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery" and that there, as here, the sympathy strike was not over any issue subject to the contract's provisions. *Id.* at 407-408. Thus, the Board's position, upheld by the court of appeals, that prohibition of sympathy strikes by a no-strike clause will not be implied, absent clear evidence of the parties' intent to encompass such strikes, is consistent with *Buffalo Forge*.

3. Petitioner's contention (Pet. 13-16) that the Board erred in not adopting the arbitrator's conclusion that the walkout was illegal is similarly without merit. Certainly the question whether a no-strike clause applies to a sympathy strike is appropriate for arbitration. See *Buffalo Forge Co.* v. *United Steelworkers of America, supra*, 428 U.S. at 410. But it is well settled that the Board is not compelled to defer to arbitral processes when an unfair labor practice has been committed, although it may elect in its discretion to do so. See *NLRB* v. *Strong*, 393 U.S. 357, 360-362 (1969). And when the Board does assert jurisdiction, its decisions take precedence over arbitral awards that enforce private contract rights. See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964).

Consistent with these principles, the Board has had a longstanding policy of deferring to an arbitral award where the arbitrator's decision is not repugnant to the purposes of

the Act, the arbitration procedures are fair and regular, and all parties have agreed to be bound by the award. *Spielberg Mfg. Co., supra.* The Board applied that policy here and declined to defer to the arbitrator's decision because it would have been repugnant to the purposes of the Act to do so. In this case, the arbitrator assumed, without discussion of the applicable principles and contrary to established Board and court precedent, that the sympathy walkout violated the contractual no-strike clause. The court of appeals correctly held that, in these circumstances, the Board did not abuse its discretion in refusing to defer to the arbitrator's decision (Pet. App. A11-A14).[6]

4. Petitioner's final contention (Pet. 16-20) is that the Union's picketing had an unlawful secondary objective in that it was intended to coerce petitioner to cease doing business with Houchin by inducing a work stoppage of petitioner's employees. This contention simply takes issue with the Board's contrary factual findings, which were upheld by the court of appeals. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.*

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[6]Contrary to petitioner's contention (Pet. 15), *NLRB* v. *Pincus Bros., Inc.*, 620 F. 2d 367 (3d Cir. 1980), and *Douglas Aircraft Co.* v. *NLRB*, 609 F. 2d 352 (9th Cir. 1979), do not conflict with the instant case. In *Pincus*, as the court of appeals noted (Pet. App. A14 n.17), the arbitrator's award was arguably consistent with the Act. In *Douglas Aircraft*, the arbitrator found two independent reasons for discharge, one of which the court found was not repugnant to the Act. These decisions have no application here where the court of appeals correctly found (Pet. App. A14-A15 n.7) that "the sympathy strike is not even arguably unprotected." Indeed, more recent decisions by the Third and Ninth Circuits have reaffirmed their recognition that the Board may refuse to defer to arbitration if it would be repugnant to the purposes of the Act to do so. See *NLRB* v. *General Warehouse Corp.*, No. 80-1472 (3d Cir. Mar. 10, 1981); *NLRB* v. *Max Factor & Co.*, 640 F. 2d 197 (9th Cir. 1980), cert. denied, No. 80-1246 (May 18, 1981). *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 615 F. 2d 1194 (8th Cir. 1980), on which petitioner also relies (Pet. 15), has since been reversed by this Court, No. 79-2006 (Apr. 6, 1981).

v. *NLRB*, 340 U.S. 474, 479 (1951).[7] *Local 761, IUE* v. *NLRB*, 366 U.S. 667 (1961), does not support petitioner's contention (Pet. 18-19) that the Union was not entitled to engage in informational picketing at petitioner's plant because it was a neutral employer in the Union's dispute with Houchin. The Court there merely upheld the Board's position that the neutral employer could attempt to lessen the impact of the picketing on its employees by establishing a separate gate and limiting the disfavored contractor and its employees to that gate.[8]

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[7]Petitioner asserts (Pet. 17) that the Union warned petitioner "of a problem if a non-union electrical contractor performed work" at the plant, told petitioner's employees in advance that a picket might be at the plant, and did nothing to stop the picketing. The record shows, however, that Union Business Agent Sroufe merely inquired if Houchin might get the work and never received an answer (Pet. App. C14-C15, C19). Nor did Sroufe tell petitioner's employees that there might be picketing if Houchin got the job. He only stated that there was a possibility that some work might go to a nonunion contractor and that he would try to work out the problem with petitioner (Pet. App. C15, C19). In addition, the record shows that the Union business agent first told the employees they should do as they wished regarding response to the picket line, and, after learning that most of the first shift left work, instructed the second shift to cross the line and work (Pet. App. C10-C11).

[8]Petitioner did not avail itself of this option until after its employees had walked off the job. On the day after the picketing began, petitioner established a separate gate for Houchin's employees, and the Union removed its pickets to that gate (Pet. App. C16-C17).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

DOJ-1981-05